16

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 69

EDWARD H. FALLOWS, TRUSTEE, APPELLANT,

vs.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, TRUSTEE IN BANKRUPTCY OF THE TENGWALL COMPANY, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED DECEMBER 2, 1912.

(23,440)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 386.

EDWARD H. FALLOWS, TRUSTEE, APPELLANT,

vs.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, TRUSTEE IN BANKRUPTCY OF THE TENGWALL COMPANY, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1914.

a

TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1910.

No. 1811.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

EDWARD H. FALLOWS, Trustee, Appellant,

vs.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee in Bankruptcy of THE TENGWALL COMPANY, Bankrupt, Appellee.

Mr. Edwin H. Cassels, Mr. Francis Adams, Jr., Counsel for Appellant.

Mr. Herman Frank, Counsel for Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Transcript of Record Filed Apr. 27, 1911.
Printed Record.
Filed Jul- 18, 1911. Edward M. Holloway, Clerk.

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Placita.

Pleas had at a Regular Term of the District Court of the United States for the Eastern Division of the Northern District of Illinois, Begun and Held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid, on the Third Monday of December (it being the Twentieth Day thereof), in the Year of Our Lord One Thousand Nine Hundred and Ten and of the Independence of the United States of America the 135th Year.

Present:

The Honorable Kenesaw M. Landis, and the Honorable George A. Carpenter, Judges of said Court presiding, Luman T. Hoy, United States Marshal for said District and T. C. MacMillan, Clerk of said Court.

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Filed Mar. 9, 1911.

Number 17798.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

Be It Remembered that heretofore, to wit, on the 9th day of March, A. D. 1911, there was filed in the Office of the Clerk of the

District Court for the Northern District of Illinois, a Certificate for Review; said Certificate for Review being in the words and figures following, to wit:

In the United States District Court for the Northern District of Illinois, Eastern Division.

In Bankruptcy. No. 17798.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

Referee's Certificate for Review.

To the Honorable George A. Carpenter, District Judge of the United States for the Northern District of Illinois:

I, Sidney Corning Eastman, the Referee in Bankruptcy in charge of the above entitled proceeding in said court, do hereby certify that in the course of the proceedings in said cause on the fourth day of June, A. D. 1910, the petition of Barnhart Brothers and Spindler, a corporation, and other creditors, was duly filed in said court, praying that the said, The Tengwall Company, be declared a bankrupt; that thereafter on the 17th day of June, A. D. 1910 said, The Tengwall Company, was duly adjudicated to be a bankrupt under the laws of the United States in such case made and provided, and said cause was referred to me as Referee in Bankruptcy for further proceedings in accordance with law; that on the 9th day of August, 1910, the Continental and Commercial Trust and Savings Bank, a corporation, of the City of Chicago in said District, was duly elected Trustee in Bankruptcy of said bankrupt, and that thereafter it duly filed its bond as such Trustee and ever since said date has been duly acting as the Trustee in Bankruptcy of said bankrupt.

3 I further certify that on the 9th day of August, 1910, Edward H. Fallows, Trustee, duly filed in my office his claim as a secured creditor, a copy of which is hereto attached, marked "Exhibit A," and made a part hereof; that thereafter on the 18th day of August, 1910, the said Continental and Commercial Trust and Savings Bank, as Trustee in Bankruptcy, filed its petition asking for the entry of an order preserving the liens of certain judgment creditors named in said petition for the benefit of said bankrupt estate, and that the said Trustee in Bankruptcy be subrogated to the rights of said judgment creditors, a copy of which petition of said Trustee in Bankruptcy is hereto attached, marked "Exhibit B" and made a part hereof; that thereafter on the 22d day of August, 1910, Edward H. Fallows, Trustee, duly filed his answer to said petition of the Trustee in Bankruptcy, copy of which said answer is hereto attached, marked "Exhibit C," and made a part hereof; that thereafter on the 22d day of August, 1910, the answer of said Fallows was found to be insufficient and an order was entered allowing the prayer of said petition and preserving said liens for the benefit of said bankrupt estate, and subrogating the Trustee in Bankruptcy to all rights, levies and liens under said judgments, a copy

of which said order is hereto attached, marked "Exhibit D," and made a part hereof; that upon the entry of said order said Edward H. Fallows, Trustee, duly objected, and excepted thereto; that thereafter on the 25th day of August, 1910, the Trustee in Bankruptcy duly filed its objections to the secured claim of said Edward H. Fallows, Trustee, a true copy of which objections is attached hereto, marked "Exhibit E" and made a part hereof; that thereafter on or about the 31st day of August, 1910, a stipulation was duly entered into between the Trustee in Bankruptcy and said Fallows to the effect that the objections to said secured claim should be heard and that any order entered upon said hearing should be entered as of 31 August, 1910, a copy of which said stipulation is hereto attached, marked "Exhibit F," and made a part hereof; and that on the filing of said stipulation an order was duly entered by the Referee, a copy of which order is hereunto attached, marked "Exhibit F. 1" and made a part hereof; that thereafter on the 16th day of September, 1910, a stipulation was duly entered into by and between said Trustee in Bankruptcy and said Fallows to the effect that said order of subrogation entered into on the 22d day of August, 1910,
4 might be reviewed on review of the final order entered on the hearing of said objections to said secured claim, a copy of which stipulation is hereto attached, marked "Exhibit G" and made a part hereof.

The matter of said objections to said secured claim of Edward H. Fallows thereafter coming on for hearing before me, I find the material facts to be as follows:

On the 3rd day of June, A. D. 1910, in the Superior Court of Cook County, in the State of Illinois, there were entered seven judgments against the said, The Tengwall Company, (now bankrupt) as follows:

A judgment in favor of the Abbott Alkaloidal Company for	$17,560.37 and costs;
A judgment in favor of the Swigart Paper Co. for	1,843.43 and costs;
A judgment in favor of Slade, Hipp & Meloy for	1,060.68 and costs;
A judgment in favor of Bradner Smith & Company for	$282.29 and costs;
A judgment in favor of the Whiting Paper Co. for	5,044.47 and costs;
A judgment in favor of De Jonghe & Company for	945.43 and costs;
A judgment in favor of the Whiting Paper Company for	1,855.98 and costs;

that on the 3rd day of June, 1910, executions were duly issued on each and all of said judgments by the Clerk of the Circuit Court of said Cook County, State of Illinois, and placed in the hands of the Sheriff of said Cook County, Illinois, for service, and that said executions remained in the hands of said Sheriff from the time they were so delivered up to and including August 31, 1910.

I further find that on the 7th day of October, 1905, the said, The Tengwall Company, duly executed and delivered to Edward H. Fallows, Trustee, its two hundred (200) bonds each for the sum of One Hundred Dollars ($100.00) dated October first, 1905, and due October first, 1920, bearing interest at the rate of five per cent (5%) per annum, payable semi-annually, on the first day of April, and on the first day of October, of each year; that attached to each of said bonds were thirty (30) interest coupons, each for the sum of Two Dollars and Fifty Cents ($2.50); that each and every one of said bonds were in the same form, and that a true copy of one of said bonds is annexed hereto, marked "Exhibit H." and made a part hereof; that to secure the payment of these bonds the said, The Tengwall Company, executed and delivered to said Edward H. Fallow a deed of trust or chattel mortgage conveying to said Fallows as trustee all the property of said Company, a true copy of which trust deed or chattel mortgage is attached hereto, marked "Exhibit I.", and made a part hereof; that said trust deed or chattel mortgage, was thereafter duly recorded in the office of the Recorder of Cook County, in the State of Illinois, on the first day of November, 1905, said Cook County being the county in which the property conveyed by said trust deed or chattel mortgage was located.

I further find that on the fifth day of October, 1908, there was duly filed in the office of the Recorder of Cook County, an affidavit of renewal of said trust deed or chattel mortgage; a true copy of which is attached hereto, marked "Exhibit J" and made a part hereof; that thereafter on the sixth day of October, 1909 there was filed in the office of the Recorder of Cook County, in the State of Illinois, a second affidavit of renewal, of said trust deed or chattel mortgage, a true copy of which is hereto attached, marked "Exhibit K." and made a part hereof.

I further find that on or about the 9th day of November, 1905, the plant of the said, The Tengwall Company, was almost destroyed by fire; that the personal property conveyed by said trust deed or chattel mortgage was destroyed by fire, except property of the value of Two Thousand Dollars ($2,000); that insurance money was collected from Insurance Companies on policies of insurance which had been issued pursuant to the terms of said trust deed or chattel mortgage, and with the consent of the said Fallows, as Trustee, and of the bankrupt the insurance money so collected was applied by the Company to replace the mortgaged property which consisted of machinery, and equipment, fixtures, furniture and stock-in-trade; that all the items of said property, except said stock-in-trade, remained practically the same from the time of their replacement after said fire until the time of their sale by said Trustee in Bankruptcy in these proceedings, except repairs, replacements of minor machinery and small additions from time to time, and except also two printing presses which were added to the plant of the said, The Tengwall Company,—one purchased in 1907, and one in 1909, and that all of the said property was allowed by the said Fallows to remain, and

did remain in the possession of the bankrupt until the insti-
6 tution of these bankruptcy proceedings, when they were taken into the possession of the Receiver appointed herein, and were kept by said Receiver until said Receiver surrendered the same to the Trustee herein.

I further find that on the 13th day of September, 1910, an order of sale was duly entered in which it was provided that all the assets of said bankrupt should be sold by the Trustee in Bankruptcy free and clear of liens, including the lien of said Fallows, and that said liens (if any existed) should attach to the proceeds of said sale, a copy of which said order of sale is hereto attached, marked "Exhibit L." and made a part hereof.

I further find that on December 30, 1910, the Trustee in Bankruptcy, duly filed a report of said sale, and that an order was duly entered approving said report and confirming and ratifying said sale; that the total amount of the proceeds of said sale was $24,134.03; that, of this sum, the proceeds of the sale of the stock-in-trade amounted to $5,000.00; the proceeds of the sale of the good-will amounted to $1,800.00, the proceeds of the sale of the patents amounted to $600.00, and that the balance of the proceeds of said sale was derived from the machinery and equipment, furniture and fixtures of said bankrupt.

I further find that the said bankrupt has always recognized the validity of said trust deed, or chattel mortgage, and of the bonds secured thereby, and has paid interest on said bonds up to and including the interest on the first day of April, 1910.

On the first day of February, 1911, an order was entered denying the motion of said Fallows, Trustee, to set aside the order of August 22, 1910, preserving the liens of said judgment creditors, and subrogating the Trustee in Bankruptcy to all rights, levies and liens under the same, and disallowing said claim of Fallows as a secured claim, and giving said Fallows permission to file said claim as an unsecured claim, to the entry of which order said Fallows, Trustee, by his counsel duly excepted; that thereupon the Referee in Bankruptcy filed his opinion in writing, a copy of which opinion is attached hereto, marked "Exhibit M.", and made a part hereof; that thereafter on the 9th day of February, 1911, said Fallows, Trustee, duly filed his exceptions in writing to the entry of said order of February first, 1911, a copy of which exceptions is hereto attached, marked "Exhibit N.", and made a part hereof; that on said 9th day
7 of February, 1911, said Fallows being an interested party in said proceeding and feeling aggrieved thereat, filed his petition for review which said petition was duly granted, a true copy of which said petition for review is hereto attached, marked "Exhibit O." and made a part hereof; and that the questions presented on this review are:

First. Did the Referee err in granting said petition of the Trustee in Bankruptcy for the preservation of said judgment liens, and for the subrogation of the Trustee in Bankruptcy to the rights of said lienors, entered on the 22d day of August, 1910?

Second. Did the Referee abuse the discretion lodged in him by the statute in entering said order of August 22, 1910?

Third. Did the Referee err in sustaining the objections of said Trustee in Bankruptcy to the validity of the lien of said trust deed or chattel mortgage, and in refusing to allow said claim of said Fallows as a secured claim?

For the information of the Court I send up herewith copies of the papers which have been referred to in the foregoing certificate, and which are marked "Exhibits A. to O."

Dated at Chicago, this 8th day of March, A. D. 1911.

Respectfully Submitted,

SIDNEY C. EASTMAN,
Referee in Bankruptcy.

Exhibit A.

Exhibit A.

This Indenture made this seventh day of October, A. D. 1905, by and between The Tengwall Company, a corporation duly created and existing under the laws of the State of Maine, hereinafter called the "Company," party of the first part, and Edward H. Fallows, Trustee, hereinafter called the "Trustee," party of the second part.

Witnesseth: that whereas the "Company" for the purpose of extending and enlarging its business and for the payment of certain outstanding liabilities incurred in the purchase of the plant and equipment of The Tengwall File & Ledger Company of New York, and in the exercising of the power on that behalf bestowed by it in accordance with a resolution adopted by the Board of Directors and by its stockholders at meetings duly and regularly called and held, has determined to make and issue its coupon bonds to the aggregate amount of Twenty Thousand (20,000) Dollars such bonds
8 being for the sum of One Hundred (100) Dollars each, numbering from one to two hundred consecutively, said bonds being payable on the first day of October, A. D. 1920, and bearing interest at the rate of five per cent per annum, payable semi-annually on the first days of April and October in each year.

Now, this Indenture Witnesseth, that he said "Company" in order to secure the payment of said several bonds hereinbefore mentioned, as they respectively fall due in the hands of the bona fide holders thereof, and the interest thereon, and in consideration of the sum of One Dollar to it in hand paid by the said "Trustee," the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, released, conveyed and confirmed, and by these presents does grant, bargain, sell, assigns, release, convey and confirm, and transfer and set-over unto the said "Trustee," his successor or successors in trust, the franchises, license, and articles of personal property, goods, chattels, etc, as follows:

All the franchises, licenses, rights and privileges of running and operating its plant, as now owned and possessed by it, and conferred upon it, by the authorities of the State of Maine, or otherwise.

2. Also all the fixtures, implements, goods, wares and merchandise, and all other articles of personal property, now belonging to and in the possession of said Company in Chicago, Illinois, New York City, New York, and elsewhere.

3. So long as the "Company" shall not make default in the payment of the interest or principal of any of said bonds as the same shall become due, and shall faithfully perform the covenants and stipulations of this indenture, it may alter any of the machinery, fixtures or other equipment on the premises occupied by it, or substitute new machinery, fixtures, or other equipments for old, in case such new machinery, fixtures and equipments shall be better adapted to or more advantageous for use in the business of the Company, or remove any of the said machinery or other equipment from any to any other of the premises occupied by it. All new property, machinery so added or substituted, all new machinery and fixtures so acquired in substitution or exchange for such machinery, fixtures or other equipments so altered or removed, shall forthwith become and be subject to the lien of these presents.

4. The "Company" covenants and agrees that it will pay all taxes, assessments and other charges lawfully assessed levied or imposed upon any of the property, rights, franchises hereby conveyed
9 or upon any part thereof, and will suffer no lien which shall have priority to this mortgage to be created or placed upon the property conveyed or mortgaged hereby, or any part thereof, and will do all acts necessary to be done to keep valid the lien and priority of these presents upon the property and franchises hereby conveyed or mortgaged and shall and will at any time and from time to time execute such other instruments and do such other acts and things as may be necessary or reasonably required by said Trustee to more effectually protect and enforce the lien of these presents upon any property or franchises intended to be conveyed hereby.

5. The "Company" shall have the right to redeem any part or all of said bonds on any interest day by first giving to the "Trustee" sixty days' notice in writing of its desire and intention so to do, which notice shall state the amount of the bonds which the "Company" so desires and intends to redeem and it shall then be the duty of the "Trustee" to determine by lot which one of the bonds at that time outstanding and unpaid shall be by him surrendered to said "Company" and cancelled and the "Trustee" shall call in such bond and upon payment to him of the face thereof and accrued interest on the interest date on said notes mentioned, all further interest on such bonds shall at once cease and such bonds shall be surrendered by the "Trustee" and canceled.

To have and to hold the same to the said "Trustee" his successor or successors in trust. And it is hereby further mutually declared, granted and agreed by the said "Company" and the said "Trustee," representing the rights and interests in the securities of the parties taking or holding the said bonds or obligations, in the form and manner following, viz: that if the said "Company" shall well and faithfully pay the said principal sum of Twenty Thousand ($20,000.00) Dollars on the day when the same is made payable by

this Indenture, as above mentioned, according to the true intent and meaning thereof, with the interest due thereon, and also the interest which may become due thereon on the days when the same is made payable, as herein mentioned, or shall deliver up, cancelled to said "Trustee," all of the said bonds mentioned herein, then these presents shall cease and determine; but if default shall be made by said Company in payment of said bonds or obligations, at the time they shall fall due, according to the true intent and meaning thereof, or it shall fail to pay the interest at the time set forth herein, and such default shall continue for a period of ninety days after due notice thereof in writing shall have been given to said "Company" by the said "Trustee," his successor or successors in trust, then it shall be lawful for the said "Trustee" his successor or successors in trust, and it shall be his duty, and he is hereby authorized and empowered, either in person or attorney, or by agents, to take possession of said goods, chattels and other articles mentioned, and also all the licenses, franchises, etc. of the "Company" and to sell or dispose of the same, or any part thereof, at public auction or at private sale, as said "Trustee," his successor or successors in trust, may determine to be for the best interests of the holders of said bonds, at the best price they can obtain for same, and out of the proceeds arising from such sale to defray the expenses of such sale, and his own just and lawful charges, and then pay over the proceeds to, and among the parties holding the said bonds or obligations, so far as may be necessary to pay the amount then due and in arrears upon the same, and the balance of the proceeds, if any there be to be paid over to the "Company" or its assigns.

And it is further agreed by the "Company" that the policies of insurance shall be effected by the "Company" upon the said implements, goods, chattels, and personal property mentioned, against loss or damage by fire, to the amount of at least Twenty Thousand ($20,000) Dollars and such insurance shall be continued from time to time, and the policies assigned to and placed in the hands of the "Trustee" as an additional security for the payment of the said bonds and obligations.

In case of death, refusal or inability to act of the Trustee herein named, for any reason whatever, then William Conover is hereby appointed and made successor in trust, having all powers and obligations of the "Trustee" herein named.

In Witness Whereof, the said "Company" has caused these presents to be signed in its name by its President, and its corporate seal to be hereunto affixed attested by its secretary, the day and year first above written.

THE TENGWALL COMPANY,
By W. C. ABBOTT, *President.*

Attest:

LOUIS P. SCOVILLE, *Secretary.*

[The Tengwall Company, Corporate Seal, 1904, Maine.]

11 STATE OF ILLINOIS,
County of Cook, ss:

I, Fred O. White, a Notary Public, in and for said County, in the State aforesaid, do hereby certify that Wallace C. Abbott, President of The Tengwall Company and Louis P. Scoville, Secretary of the Tengwall Company, personally known to me to be the President and Secretary of the Tengwall Company, whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, and as the act and deed of The Tengwall Company for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this seventh day of October, A. D. 1905.

[Fred C. White, Notary Public, Cook County, Illinois.]

FRED O. WHITE,
Notary Public.

Form No. 32.

Proof of Secured Debt.

In the District Court of the United States for the Northern District of Illinois.

In Bankruptcy. No. 17798.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

Proof of Secured Debt.

At New York, in said district of New York, on the Fourth day of August, A. D. 1910, came Edward H. Fallows, Trustee, of New York, in the County of New York in said district of New York, and made oath, and says that The Tengwall Company, the person (1) against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of Twenty
12 Thousand Dollars, with interest at the rate of five per cent per annum from April first, A. D. 1910, that the consideration of said debt is as follows: that said debt is part of the purchase price paid for the business, property and assets of The Tengwall File and Ledger Company of New York by the Tengwall Company, the bankrupt above named, as evidenced by Two Hundred bonds of $100 each, bearing interest at the rate of five per cent per annum, that no part of said debt has been paid (2) that there are not setoffs or counterclaims to the same (3) and that the only securities held by this deponent for said debt are the following: a chattel mortgage on all property of every kind of the Tengwall Company, dated October 7, 1905, to Edward H. Fallows, Trustee, executed by The Tengwall Company, by W. C. Abbott, its President, and delivered to

said Edward H. Fallows, Trustee, to secure the payment of principal and interest of the bonds referred to, a copy of which chattel mortgage is hereto attached and made a part hereof.

EDWARD H. FALLOWS,
Trustee, Creditor.

Subscribed and Sworn to before me, this 4th day of August A. D. 1910.

WILLIAM CONOVER,
Notary Public.

(Official Character.) N. Y. Co.

"EXHIBIT B."

Exhibit B.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

To Honorable Sidney C. Eastman, Referee:

The petition of Continental & Commercial Trust & Savings
13 Bank respectfully shows that it was duly appointed as trustee herein, and has qualified as such trustee.

Your petitioner further shows that the assets of the bankrupt which came into its possession consist of a plant for the manufacture of loose leaf devices and kindred articles, machinery, merchandise and outstanding accounts, said manufacturing plant being situated in Ravenswood, Chicago, Illinois.

Your petitioner further shows that on June 3, 1910, there was entered in the Superior Court of Cook County, certain judgments against the bankrupt, said judgments being hereinafter enumerated.

That on said June 3, 1910, executions were issued on said judgments to the sheriff of Cook County, and that from the time of the issuing of said executions, the same became liens to the amount thereof upon all of the property of the bankrupt herein; that on June 4, 1910, these bankruptcy proceedings were instituted by the filing of the creditors' petition.

Your petitioner further shows that said executions are still in the hands of the sheriff and are wholly unsatisfied.

That the following is a list of the judgments hereinabove referred to:

Abbott Alkaloidal Co.	17,560.37 and costs.
Swigart Paper Co.	1,843.43 and costs.
Slade, Hipp & Meloy	1,060.68 and costs.
Bradner, Smith & Co.	282.29 and costs.
Whiting Paper Co.	5,044.47 and costs.
De Jonghe & Co.	945.43 and costs.
Whiting Paper Co.	1,855.98 and costs.

(The first column containing the name of the judgment creditors and the second column containing the amounts of the respective judgments of said judgment creditors.)

Your petitioner further shows that in order to avoid certain transfers it will be necessary for the benefit of the estate to preserve the liens of said judgments and executions, and to have the trustee subrogated to such rights and liens; that there are certain conveyances made by the said bankrupt prior to the institution of these bankruptcy proceedings, which are absolutely void as against the judgment and execution creditors, but which may not be void as against the trustee and that, therefore, it will be of great benefit to this estate to have said judgment and execution rights and liens preserved and said trustee subrogated to such rights and liens.

Wherefore, your petitioner prays for an order preserving
14 the rights and liens against the property and assets of the bankrupt under the judgments and executions above referred to and to have the trustee subrogated to such rights and liens and your petitioner will ever pray.

CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, *Trustee*.
By ARTHUR CLARK, *Agent*.

STATE OF ILLINOIS,
County of Cook, ss:

Arthur Clark being duly sworn, deposes and says that he is the agent in this behalf of the above named petitioner; that the foregoing petition is true in substance and in fact.

ARTHUR CLARK.

Subscribed and sworn to before me this 18th day of August, 1910.
JAMES W. DAVIS,
Notary Public.

"EXHIBIT C."

"Exhibit C."

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In the Matter of TENGWALL COMPANY, Bankrupt.

Answer of Edward H. Fallows, Trustee, to the Petition of the Continental and Commercial Trust and Savings Bank, Trustee.

The answer of Edward H. Fallows, Trustee, to the petition of the Continental and Commercial Trust and Savings Bank, Trustee, re-
15 spectfully shows that he admits the appointment of said Continental and Commercial Trust and Savings Bank, as Trustee, as set forth in said petition:

That he neither admits or denies the entry of the judgments described in said petition, and the issuing of executions thereon, and calls for strict proof of each and every one of the allegations with reference thereto.

Said respondent further charges that the judgments described in said petittion were not entered in good faith and that the executions thereupon were not issued and delivered to the sheriff with the intent that they should be levied upon the property of said Tengwall Company, and that said executions were delivered to the sheriff with the intention that they should not be levied upon the property of said Tengwall Company, and that said executions never became liens upon any of the property of said Tengwall Company.

Said respondent further charges that each of the judgments described in said petition was entered upon a certain pretended judgment note made on June third, A. D. 1910, and that said judgment notes were executed without the proper authority of the officers and board of directors of said Tengwall Company, and that each of said notes was and is, and the judgment entered upon it was and is, wholly null and void and of no effect whatsoever.

That each of said pretended judgment notes was made on the day preceding the date of the filing of the petition in involuntary bankruptcy herein; that each of said notes was made with the knowledge on the part of both said Tengwall Company and the payee named in said note that bankruptcy proceedings against said Tengwall Company were in contemplation, and that it was the purpose and intention on the part of both said Tengwall Company, and each of the payees named in said notes that the judgments entered upon said notes should not be enforced against the property of said Tengwall Company by the levy of executions upon the property of said Tengwall Company, and that on the contrary it was the purpose and intention of the persons whose names are affixed to said notes and who pretended to act on behalf of said Tengwall Company in making them, and of each of said payees in said notes, that said judgments should be used solely for the purpose of attempting to assert a lien against the property of said Tengwall Company to the prejudice of the rights of said respondent as a preferred creditor under a
16 chattel mortgage duly executed by said Tengwall Company, and in full force and effect at the time of the making of said notes and the entry of said judgments.

Respondent further shows that no transfers of the property of said Tengwall Company have been made to avoid which it is necessary to preserve the liens of the judgments and executions described in said petition; that the subrogation sought in said petition is for the purpose solely of attacking the validity of the chattel mortgage of said respondent; that there have been no conveyances of the property of said Tengwall Company, except as the chattel mortgage of said respondent may be called a conveyance; that said chattel mortgave was given to secure the payment of a bona fide indebtedness on the part of said Tengwall Company in the amount of Twenty Thousand Dollars ($20,000); that said Tengwall Company has always recognized the validity of said chattel mortgage, and has paid the

interest on the bonds secured thereby; that no creditor has ever disputed the validity of said mortgage or the validity of the lien created thereby; that all of the indebtedness represented by the notes upon which the judgments described in said petition was contracted with full knowledge on the part of each of the judgment creditors named in said petition with reference to the existence of said chattel mortgage, and with full recognition on the part of each one of them of the validity of said chattel mortgage; that at the time of the pretended making of said notes and the entry of said judgments on said third day of June, said mortgage was in full force and effect and was known to be so by each of the judgment creditors named in said petition; that each of said creditors had full knowledge of said mortgage and has always dealt in connection with contracting the indebtedness represented by said notes upon the understanding that said mortgage was a valid first lien upon the property of said Tengwall Company.

Respondent further charges with reference to the pretended judgment in favor of the Abbott Alkaloidal Company, that a motion was duly entered on the fourth day of June, 1910, in the Circuit Court of Cook County, to vacate and set aside said judgment and that said motion is now pending and undisposed of in said court.

Respondent further charges that the making of said notes and the entry of said judgments described in said petition, was a part of a scheme on the part of one W. C. Abbott, President of said
17 Tengwall Company, and of certain other officers and directors of said Company acting in collusion with him to attack the lien of said respondent under said chattel mortgage; that said notes and all of the pleadings in said suits were prepared by and under the direction of one Julian C. Ryer, the attorney for said W. C. Abbott, and of the officers and directors acting in collusion with him; that in all of said transactions said Ryer actually, and in fact, was acting as attorney not only for said Tengwall Company, but for each of said judgment creditors; that the making of said notes and the entry of judgment thereupon was a part of a contemplated plan to procure the adjudication of said Tengwall Company as an involuntary bankrupt, and to set aside wrongfully the lien of said respondent under his said chattel mortgage; and that the purpose for which it is sought to subrogate said trustee to the rights of said pretended judgment creditors is wholly inequitable and fraudulent.

Respondent further answering denies that said judgments are or ever were bona fide liens upon the property of said Tengwall Company, and charges that the executions issued thereon were never delivered to the sheriff of Cook County for the purpose of their being levied upon the property of said Tengwall Company, and that no lien whatsoever was ever obtained against the property of said Tengwall Company under or by virtue of any of said executions.

Respondent further charges that it is not necessary for the benefit of said estate to preserve the liens of said pretended judgments and executions; that no property whatsoever will be added to said estate by the preservation of said liens; that the contest, if any, with reference to the validity of said chattel mortgage, is a contest mostly be-

tween creditors of said estate in which said trustee is in no way interested whatsoever; that said trustee was appointed to represent all the creditors of said estate, secured and unsecured alike; that said respondent as trustee is both a secured and unsecured creditor, and that it is the duty of said trustee to act impartially toward all creditors; that if the lien of said respondent as trustee is declared to be invalid, it will not be of any benefit to the estate as such but only to those creditors whose claims are not secured; that said unsecured creditors should be left to enforce such rights as they may have in the premises free from the direction, control or interference of the trustee, and that for said trustee to become a party to said fraudulent and collusive scheme to give effect to said judgments for the pur-
18 pose of invalidating the lien of said respondent under said chattel mortgage, is a gross misuse of the power and authority of said trustee and a violation of the duty of said trustee.

And having fully answered said respondent prays that said petition may be denied.

EDWARD H. FALLOWS, *Trustee*,
By WILKERSON & CASSELS,
His Attorneys.

"EXHIBIT D."

"Exhibit D."

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In the Matter of TENGWALL COMPANY, Bankrupt.

This cause this day coming on to be heard upon the motion of the Trustee to have the rights and liens under certain judgments recovered in the Superior Court of Cook County against the bankrupt herein on June 3rd, 1910, which judgments are as follows, to-wit:

Judgment Creditors.	Amounts.
Swigart Paper Co.	$1,843.43
Slade, Hipp & Meloy	1,060.68
Louis De Jonghe & Co.	945.43
Abbott Alkaloidal Co.	17,560.37
Bradner Smith & Co.	282.29
Whiting Paper Co.	5,044.99
Whiting Paper Co.	1,855.98

And to have the rights, levies and liens under executions issued on said judgments on said June 3rd, 1910, and delivered to the sheriff of Cook County, preserved for the benefit of the bankrupt's estate, and to have the trustee herein subrogated to the rights of the judgment creditors under and by virtue of said judgments and

executions and the liens and levies thereunder, and the said
19 trustee having filed a petition praying for such relief and due notice of this motion having been served upon Edward H. Fallows, Trustee, and upon the hearing of said motion, Julian C. Ryer, attorney for said judgment creditors, appearing before me and consenting that said motion be granted, and Edward H. Fallows, trustee, appearing by James H. Wilkerson, Esquire, his attorney, having filed the answer of said Edward H. Fallows, trustee, to said petition, and the trustee herein appearing by Herman Frank, its attorney and objecting to said answer as being insufficient, and as not constituting a defense to said motion and petition, and after hearing the arguments of counsel and due deliberation thereon being had.

It Is Ordered that the objections to the answer of said Edward H. Fallows, trustee, be and the same are hereby sustained and said answer is hereby adjudged to be insufficient as not constituting a defense to said motion and petition, and said Edward H. Fallows, trustee, by his attorney, electing to stand by his said answer.

It Is Further Ordered that said motion be, and the same is hereby allowed.

And It Is Further Ordered that all the rights under said judgments and executions and against the property of the bankrupt and all liens, levies and rights under the executions issued on said judgments against said property shall be and the same hereby are preserved for the benefit of the bankrupt's estate herein, and the trustee herein is hereby subrogated to all the rights, levies and liens under said judgments and executions, and that said trustee may proceed under said judgments and executions and have the same rights and liens thereunder as the judgment creditors in said judgments would have had had not bankruptcy proceedings intervened.

20 "EXHIBIT E."

Exhibit E.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

Now comes Continental & Commercial Trust & Savings Bank, trustee herein, and objects to the proof of debt filed herein by Edward H. Fallows, trustee, wherein and whereby said Edward H. Fallows, trustee, claims to have security for the amount mentioned in said proof of debt upon the assets of the bankrupt's estate by virtue of an alleged chattel mortgage purporting to have been executed by the bankrupt herein, dated October 5, 1905, and specifies the following as grounds of objection to said proof of debt:

First. On information and belief the trustee herein alleges that the bonds and evidences of indebtedness to secure which the said

chattel mortgage purports to have been given, do not state upon their face that they are secured by chattel mortgage or trust deed, and do not state upon their face the fact of such security, and such chattel mortgage is, therefore, according to the provisions of the statutes of the State of Illinois, absolutely void.

Second. The said chattel mortgage is absolutely void for the reason that the bankrupt, the mortgagor in said chattel mortgage mentioned, was at the time of the execution thereof, to-wit, October 7, 1905, a resident of Cook County, State of Illinois, and such chattel mortgage was not acknowledged before a Clerk or any Deputy Clerk of the Municipal Court of the City of Chicago, and the statute in such case made and provided was not in any way complied with.

Third. Said chattel mortgage is absolutely void for the following reasons:

The same purports to have been given to secure the payment of coupon bonds for Twenty Thousand Dollars (20,000) said
21 bonds being of the sum of $100.00 each, and being made payable according to their terms on the first day of October, 1920, and not sooner; that said alleged chattel mortgage was on November 1, 1905, recorded in the office of the Recorder of Deeds of Cook County, Illinois, which was the County in which the said mortgagor, the bankrupt, resided at the time the said mortgage was executed and recorded, and the county where the property conveyed by said chattel mortgage was situated and kept at the time of the execution of said chattel mortgage, and where it is claimed the said property continuously has been kept since the time of the execution of said chattel mortgage; that pursuant to the statutes of the State of Illinois in such case made and provided, such chattel mortgage if bona fide would be good and valid from the time it was filed for record for a period not exceeding three years from the date of filing of said mortgage, to-wit: up to November 1, 1908, unless within thirty days next preceding the expiration of said three years the said mortgager and the said mortgagee should file for record in the office of said Recorder of Deeds of Cook County, Illinois, an affidavit setting forth the particular interest said mortgagor has by virtue of such mortgage in the property in said mortgage mentioned, and the amount remaining unpaid upon the money to secure which the said chattel mortgage was given, and the time when same would become due by extension or otherwise; that on October 5, 1908, there was filed for record in the office of the Recorder of Deeds of Cook County, an affidavit purporting to have been made by the Vice-President of said mortgagor and by Edward H. Fallows, as trustee and mortgagee, setting forth certain matters intended to be in compliance with the provisions of the statute providing for the time for an extension of the debt secured by said chattel mortgage; that said affidavit so filed if it had complied with the requirements of the statute would have resulted in extending the lien and life of said chattel mortgage for only one year, to-wit: from October 5, 1908, the date of filing said affidavit, until October 5, 1909; that pursuant to the terms and provisions of the statute of the State of Illinois in such case made and provided, the lien of said chattel mortgage could not

be extended for more than one year from the filing of such extension affidavit, and, therefore, the lien and life of said chattel mort-
22 gage, if any such existed, expired according to the provisions of said statute on October 5, 1909, that pursuant to the statute only one affidavit extending the lien of a mortgage previously filed may be filed, and, therefore, on October 5, 1909, the lien of said mortgage, if any such existed, ceased to be good and valid and became and was absolutely void; and such chattel mortgage as to third persons, including the creditors of such mortgagor and the trustee herein, was and is absolutely void from said October 5, 1909; that even if the statute should allow another affidavit for extension to be filed so as to further extend the life and validity of the lien of said chattel mortgage, such second or additional affidavit would, under said supposition have to be filed within thirty days next preceding October 5, 1909, that is to say, between September 5, 1909, and October 4, 1909; that in fact an affidavit similar in terms to the first one hereinabove referred to was filed in the said Recorder's Office on October 6, 1909, which said last mentioned date was after the expiration of the period of thirty days next preceding said October 5, 1909; that by reason of the failure to comply with the provisions of the statutes of the State of Illinois relating in particular to the filing thereof or the filing of extensions thereof, said chattel mortgage became on and after October 4, 1909, and at the time of the institution of these bankruptcy proceedings was, and still is, null and void, and particularly as against third persons, including the creditors of said mortgagor and the trustee herein: that from the time of the execution of said chattel mortgage until the institution of these bankruptcy proceedings, the personal property purporting to have been conveyed by said chattel mortgage was never in the possession of the mortgagee, nor was it ever taken into the possession of the said mortgagee; that all the property of the bankrupt, the said mortgagor, including the property upon which the said Edward H. Fallows, as trustee, claims to have a lien by virtue of said chattel mortgage, came into the possession of the trustee herein and is still in its possession and that said chattel mortgage, if it ever did constitute a lien upon the property of the bankrupt herein, became absolutely void and of no effect, and the lien thereon became wholly lost and destroyed for the reasons above set forth, as to the creditors of said bankrupt, and particularly as against judgment execution creditors; that on June 3, 1910, certain judgments were duly recovered in the Superior
23 Court of Cook County against the bankrupt herein; said judgments being in favor of the following firms and corporations and for the amounts set opposite their respective names, to-wit:

Swigart Paper Co.	$1,843.43
Slade, Hipp & Meloy	1,060.68
Abbott Alkaloidal Co.	17,560.37
Louis De Jonghe & Co.	945.43
Bradner Smith & Co.	282.29
Whiting Paper Co.	5,044.99
Whiting Paper Co.	1,855.98

that on said June 3rd, 1910, executions on all of said judgments were duly issued and delivered to the sheriff of the County of Cook, State of Illinois, said County being the county wherein the assets of said bankrupt upon which said Edward H. Fallows, as trustee, claims a lien were situated; that immediately upon the issuing and delivery of said executions to said sheriff as aforesaid, said executions, by virtue of the statute in such case made and provided, became liens upon all of the property of the bankrupt situated in said County, including the property upon which said Edward H. Fallows, as trustee, claims a lien; that said executions are still in the hands of the sheriff and are still wholly unsatisfied and said judgments still remain wholly unpaid; that while said executions were so in the hands of said sheriff these bankruptcy proceedings were instituted; that on the 22nd day of August, 1910, by order duly entered herein the liens, levies and rights against the assets of the bankrupt arising and existing under and by virtue of said judgments and executions were preserved for the benefit of this bankrupt estate, and the trustee herein was subrogated to all such liens, levies and rights; that said trustee is, therefore, now vested with the same powers, rights and privileges to assert and claim the invalidity of said chattel mortgage and the lien thereof as the judgment and execution creditors hereinabove referred to would have had if these bankruptcy proceedings had not intervened; that said trustee has elected to and does hereby assert by reason of the premises, that such chattel mortgage and the lien thereof is at least to the extent of the aggregate amount of said judgments void and of no effect.

Fourth. A great part of the assets of the bankrupt consists of merchandise, outstanding accounts, monies, choses in action
24 and personal property of a similar nature. Said chattel mortgage does not by its terms create any lien upon the assets of the kind above enumerated, and as to such assets is null and void.

Fifth. Said chattel mortgage is ineffectual to constitute in any way a lien upon the assets of the bankrupt which came into this trustee's possession, as claimed in said proof of debt, or upon any part thereof, for the reason that none of the assets of the bankrupt which existed at the time of the institution of these bankruptcy proceedings or which came into the possession of this trustee, was in existence at the time of the execution of said chattel mortgage; and such chattel mortgage if it purports to convey or transfer property acquired by the bankrupt subsequent to its execution and delivery is void as to third persons, including judgment and execution creditors, and this trustee.

Sixth. The description of the property purporting to be conveyed by said chattel mortgage is vague, uncertain and indefinite; the property claimed to be mortgaged is not sufficiently identified nor can it be identified, and, therefore, said chattel mortgage is ineffectual to convey any property of the bankrupt or to create a lien thereon.

Seventh. Said chattel mortgage is for other reasons irregular, defective and invalid and for that reason wholly void and ineffectual to create any lien.

Wherefore, the trustee herein prays that said proof of debt of Ed-

ward H. Fallows, trustee, filed herein be disallowed as a secured claim, and that said chattel mortgage be declared null and void and of no effect.

CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, *Trustee*,
By F. H. JONES, *Secretary*.

HERMAN FRANK,
Attorney for Trustee.

25 "EXHIBIT F."

Exhibit F.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. —.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

This cause coming on to be heard before Referee Eastman upon notice by the trustee herein, to dispose of the objections filed by said trustee to the secured claim filed herein by E. H. Fallows, Trustee, and said E. H. Fallows, Trustee, appearing herein by Messrs. Wilkerson & Cassels, his attorneys, and requesting a continuance of the hearing of said objections, and the trustee herein consenting thereto, on condition that the following stipulation be made,

It Is Therefore Stipulated herein between the attorney trustee herein to the secured claim filed herein by E. H. Fallows, Trustee, that the hearing of the objections filed by the trustee herein to *be* secured claim filed herein by E. H. Fallows, Trustee, shall be heard as of this thirty first day of August, A. D. 1910, and that the finding of the Court upon said claim and the objections thereto, and the order and judgment thereon, shall be entered herein nunc pro tunc as of said thirty first day of August, A. D. 1910.

It Being Expressly Stipulated, however, that the rights of either party as to time for a revision, or a review or an appeal from said finding and judgment shall not be prejudiced in any way by the entry nunc pro tunc as above stated, but that the time to begin proceedings to appeal, or revise or review said finding and judgment shall be considered hereunder as and from the actual date of the entry of said judgment.

HERMAN FRANK,
PERCY B. DAVIS,
Att'ys for Trustee in Bankruptcy.
WILKERSON & CASSELS,
Attorneys for E. H. Fallows, Trustee.

26 "EXHIBIT F-1."

"Exhibit F. I."

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 17798.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

This cause coming on to be heard upon the stipulation herewith filed, in pursuance of asid stipulation it is ordered:

That the hearing of the objections filed by the Trustee herein to the secured claim filed herein by E. H. Fallows, Trustee, shall be heard as of August 31st, 1910, and

That the finding of the court upon said claim and the objections thereto, and the order and judgment thereon, shall be entered herein nunc pro tunc as of said Thirty-first day of August, A. D. 1910.

It is further ordered that the rights of either party as to time for a revision, or a review, or an appeal from the said finding and judgment shall not be prejudiced in any way by the entry nunc pro tunc, as above stated, but that the time to begin proceedings to appeal, or revise or review said finding and judgment shall be considered hereunder as and from the actual date of the entry of said judgment.

——— ———.

——— ———.

27 "EXHIBIT G."

Exhibit G.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. —.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

It is hereby stipulated and agreed by and between The Continental and Commercial Trust and Savings Bank, Trustee, for the Bankrupt herein, by Herman Frank and Percy B. Davis, its Attorneys, and Edward H. Fallows, Trustee, by James H. Wilkerson, his attorney, that after the hearing upon the merits of the objections filed by the Trustee herein to the claim of Edward H. Fallows, trustee, upon certain bonds secured by Chattel Mortgage, the said Edward H. Fallows shall have the right to review, not only the final finding upon said claim, but also the order of the Referee heretofore entered herein upon the petition of the Continental and Commercial Trust and Savings Bank, preserving the liens of certain judg-

ments for the benefit of the Estate and subrogating the Trustee of the Bankrupt thereto, the same as if said Fallows had filed his petition for review of said order within ten days after the entry thereof, it being hereby stipulated that any rights inhering in the Trustee for the Bankrupt under said ten (10) days' rule are hereby waived.

This stipulation is given in confirmation of the stipulation made in open court between the parties hereto before Referee Eastman, this 16th day of September, A. D. 1910.

HERMAN FRANK,
PERCY B. DAVIS,
Att'ys for Cont. & Com. Trust and Savings Bank, Trustee for Tengwall Co., Bankrupt.

JAMES H. WILKERSON,
WILKERSON & CASSELS,
Attorneys for Edward H. Fallows, Trustee.

28 "EXHIBIT H."

"Exhibit H."

UNITED STATES OF AMERICA:

$100.00. No. 47.

The Tengwall Company.

Fifteen Year, Five Per Cent Gold Coupon Bond.

Know All Men by These Presents, That The Tengwall Company, a corporation created and existing under and by virtue of the laws of the State of Maine, for value received, hereby promises to pay to Edward H. Fallows, Trustee, or Bearer, the sum of one hundred ($100.00) dollars in gold coin of the United States of America, of the present standard of weight and fineness, on the first day of October, A. D. 1920, at the City of New York, and to pay interest thereon, from the first day of October, A. D. 1905, at the rate of five per cent per annum, payable in said city, in like gold coin semi-annually, on the first days of April and October, in each year, upon presentation and surrender, as they severally mature, of the said coupons hereto annexed.

All Payments Upon This Bond, both of principal and interest, shall be made without deduction of any tax, assessment or other charge, which the said obligor or its successors or assigns, may pay or be required to pay, deduct, or retain therefrom under any law or regulation, heretofore or hereafter enacted, by the United States, or any State, County or Municipality therein, or any political community whatsoever.

This Bond Is One of a Series of two hundred (200) of like form, tenor, effect, amount, and date, and numbered consecutively from one (1) to two hundred (200), both inclusive, which said series of

bonds is limited in amount to twenty thousand ($20,000.00) dollars, all of which bonds are issued under and equally secured by the mortgage or deed of trust, dated the seventh day of October, A. D. 1905, executed by The Tengwall Company to Edward H. Fallows, as trustee, to which mortgage or deed of trust reference is made for a description of the properties and franchises mortgaged, the nature and extent of the security, the rights of the holders of the bonds under the same, and the terms and conditions upon which the bonds are issued and secured.

29 This Bond and said trust deed or mortgage securing the same were duly authorized by the Stockholders and Board of Directors of the obligor Company at meetings of said Stockholders and Directors, respectively, duly convened and held at its office in Chicago, Illinois, on the seventh day of October, A. D. 1905.

This Bond shall be transferable by delivery and become effective and obligatory for all purposes after it shall have been authenticated by the certificate hereon endorsed by the said Edward H. Fallows, as trustee.

This Bond is subject to call or redemption on the terms and in the manner provided in said deed of trust, reference to which is hereby made with the same effect as if herein fully set forth.

In Witness Whereof The Tengwall Company has caused these presents to be signed on its behalf by its President, and its corporate seal to be hereunto affixed, attested by its Secretary, and coupons for said interest, bearing the engraved fac-simile signature of its Treasurer, to be hereunto attached this seventh day of October, A. D. 1905.

THE TENGWALL COMPANY,

(Signed) By W. C. ABBOTT, *President.*

Attest:

[The Tengwall Company Corporate Seal, 1904, Maine.]

(Signed) By W. C. ABBOTT, *President.*

"EXHIBIT I."

"*Exhibit* I."

This Indenture made this seventh day of October, A. D. 1905, by and between The Tengwall Company, a corporation duly created and existing under the laws of the State of Maine, hereinafter called the "Company," party of the first part, and Edward H. Fallows, Trustee, hereinafter called the "Trustee," party of the second part.

Witnesseth: that whereas the "Company" for the purpose of

30 extending and enlarging its business and for the payment of certain outstanding liabilities incurred in the purchase of the plant and equipment of The Tengwall File & Ledger Company of New York, and in the exercising of the power on that behalf bestowed by it in accordance with a resolution adopted by the Board

of Directors and by its stockholders at meetings duly and regularly called and held, has determined to make and issue its coupon bonds to the aggregate amount of Twenty Thousand (20,000) Dollars such bonds being for the sum of One Hundred (100) Dollars each, numbering from one to two hundred consecutively, said bonds being payable on the first day of October, A. D. 1920, and bearing interest at the rate of five per cent per annum, payable semi-annually on the first days of April and October in each year.

Now, this Indenture Witnesseth, that the said "Company" in order to secure the payment of said several bonds hereinbefore mentioned, as they respectively fall due in the hands of the bona fide holders thereof, and the interest thereon, and in consideration of the sum of One Dollar to it in hand paid by the said "Trustee," the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, released, conveyed and confirmed, and by these presents does grant, bargain, sell, assign, release, convey and confirm, and transfer and set-over unto the said "Trustee," his successor or successors in trust, the franchises, licenses and articles of personal property, goods, chattels, etc., as follows:

All the franchises, licenses, rights and privileges of running and operating its plant, as now owned and possessed by it, and conferred upon it, by the authorities of the State of Maine, or otherwise.

2. Also all the fixtures, implements, goods, wares and merchandise, and all other articles of personal property, now belonging to and in the possession of said Company in Chicago, Illinois, New York City, New York, and elsewhere.

3. So long as the "Company" shall not make default in the payment of the interest or principal of any of said bonds as the same shall become due, and shall faithfully perform the covenants and stipulations of this indenture, it may alter any of the machinery, fixtures or other equipment on the premises occupied by it, or substitute new machinery, fixtures, or other equipments for old, in case such new machinery, fixtures and equipments shall be better adapted to or more advantageous for use in the business of the Com-
31 pany, or remove any of the said machinery or other equipment from any to any other of the premises occupied by it. All new property, machinery so added or substituted, all new machinery and fixtures so acquired in substitution or exchange for such machinery, fixtures or other equipments so altered or removed, shall forthwith become and be subject to the lien of these presents.

4. The "Company" covenants and agrees that it will pay all taxes, assessments and other charges lawfully assessed levied or imposed upon any of the property, rights, franchises hereby conveyed or upon any part thereof, and will suffer no lien which shall have priority to this mortgage to be created or placed upon the property conveyed or mortgaged hereby, or any part thereof, and will do all acts necessary to be done to keep valid the lien and priority of these presents upon the property and franchises hereby conveyed or mortgaged and shall and will at any time and from time to time execute such other instruments and do such other acts and things as may be necessary or reasonably required by said Trustee to more effectually

protect and enforce the lien of these presents upon any property or franchises intended to be conveyed hereby.

5. The "Company" shall have the right to redeem any part or all of said bonds *or* any interest day by first giving to the "Trustee" sixty days' notice in writing of its desire and intention so to do, which notice shall state the amount of the bonds which the "Company" so desires and intends to redeem and it shall then be the duty of the "Trustee" to determine by lot which one of the bonds at that time outstanding and unpaid shall be by him surrendered to said "Company" and cancelled and the "Trustee" shall call in such bond and upon payment to him of the face thereof and accrued interest on the interest date on said notes mentioned, all further interest on such bonds shall at once cease and such bonds shall be surrendered by the "Trustee" and canceled.

To have and to hold the same to the said "Trustee" his successor or successors in trust. And it is hereby further mutually declared, granted and agreed by the said "Company" and the said "Trustee," representing the rights and interests in the securities of the parties taking or holding the said bonds or obligations, in the form and manner following, viz: that if the said "Company" shall well and faithfully pay the said principal sum of Twenty Thousand ($20,-
000.00) Dollars on the day when the same is made payable
32 by this Indenture, as above mentioned, according to the true intent and meaning thereof, with the interest due thereon; and also the interest which may become due therein on the days when the same is made payable, as herein mentioned, or shall deliver up, cancelled to said "Trustee," all of the said bonds mentioned herein, then these presents shall cease and determine; but if default shall be made by said Company in payment of said bonds or obligations, at the time they shall fall due, according to the true intent and meaning thereof, or it shall fail to pay the interest at the time set forth herein, and such default shall continue for a period of ninety days after due notice thereof in writing shall have been given to said "Company" by the said "Trustee," his successor or successors in trust, then it shall be lawful for the said "Trustee" his successor or successors in trust, and it shall be his duty, and he is hereby authorized and empowered, either in person or attorney, or by agents, to take possession of said goods, chattels and other articles mentioned, and also all the licenses, franchises, etc., of the "Company" and to sell or dispose of the same, or any part thereof, at public auction or at private sale, as said "Trustee," his successor or successors in trust, may determine to be for the best interests of the holders of said bonds, at the best price they can obtain for same, and out of the proceeds arising from such sale to defray the expenses of such sale, and his own just and lawful charges, and then pay over the proceeds to, and among the parties holding the said bonds or obligations, so far as may be necessary to pay the amount then due and in arrears upon the same, and the balance of the proceeds, if any there be to be paid over to the "Company" or its assigns.

And it is further agreed by the "Company" that the policies of insurance shall be effected by the "Company" upon the said imple-

ments, goods, chattels, and personal property mentioned, against loss or damage by fire, to the amount of at least Twenty Thousand ($20,000) Dollars and such insurance shall be continued from time to time, and the policies assigned to and placed in the hands of the "Trustee" as an additional security for the payment of the said bonds and obligations.

In case of death, refusal or inability to act of the Trustee herein named, for any reason whatever, then William Conover is hereby appointed and made successor in trust, having all powers and obligations of the "Trustee" herein named.

33 In Witness Whereof, the said "Company" has caused these presents to be signed in its name by its President, and its corporate seal to be hereunto affixed attested by its secretary, the day and year first above written.

THE TENGWALL COMPANY,
By W. C. ABBOTT, *President.*

Attest:

[The Tengwall Company Corporate Seal, 1904, Maine.]

LOUIS P. SCOVILLE, *Secretary.*

STATE OF ILLINOIS,
County of Cook, ss:

I, Fred O. White, a Notary Public, in and for said County, in the State aforesaid, do hereby certify that Wallace C. Abbott, President of The Tengwall Company and Louis P. Scoville, Secretary of the Tengwall Company, personally known to me to be the President and Secretary of the Tengwall Company, whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, and as the act and deed of The Tengwall Company for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this seventh day of October, A. D. 1905.

FRED C. WHITE,
Notary Public, Cook County, Illinois.
FRED O. WHITE,
Notary Public.

34 "EXHIBIT J."

"Exhibit J."

In the Matter of the Renewal before Expiration of the Chattel Mortgage from The Tengwall Company to Edward H. Fallows, Trustee.

Affidavit.

STATE OF NEW YORK,
County of New York, ss:

H. N. McClain and Edward H. Fallows, being severally duly sworn, each for himself says; That your deponent, H. N. McClain is

the Vice-President and General Manager of The Tengwall Company, a Maine corporation and the mortgagor as hereinafter more particular- set forth, and makes this affidavit in behalf of and as agent of said Company.

That your deponent Edward H. Fallows, is the mortgagee as hereinafter more particularly set forth;

That on the 7th day of October 1905, the said The Tengwall Company made, executed and delivered a mortgage of personal property to the said Edward H. Fallows, Trustee: which said mortgage was subsequently duly recorded in the office of the Recorder of Cook County, State of Illinois, on the 1st day of November 1905, in Book of Records #8689 at page 335 thereof;

That this affidavit is made for the purpose of obtaining a renewal before the expiration of the mortgage of personal property hereinabove referred to pursuant to the laws of Illinois 1903, page 254.

That the interest which Edward H. Fallows as Trustee, the mortgagee under said chattel mortgage, has in the property therein mentioned, is that of Trustee for the holders of the bonds of the said The Tengwall Company outstanding under the mortgage and Trust Deed, dated the 7th day of October 1905 made by the said The Tengwall Company to said Edward H. Fallows as Trustee and secured by said mortgage and Trust Deed hereinabove mentioned in the property therein mentioned and conveyed to the said Edward H. Fallows by said mortgage.

That said chattel mortgage is for the payment of money and the amount remaining unpaid thereon is Twenty Thou-
35 sand Dollars ($20,000) of principal and interest from the 1st day of April 1908.

That the time when the mortgage will become due is the first day of October 1920.

H. N. McCLAIN. [SEAL.]
EDWARD H. FALLOWS. [SEAL.]

Sworn to before me by Edward H. Fallows this 23rd day of September A. D. 1908.

[Seal of William Conover, Notary Public, New York County.]

WILLIAM CONOVER,
Notary Public, New York County.

Sworn to before me by H. N. McClain this 23rd day of September A. D. 1908.

[Seal of William Conover, Notary Public, New York County.]

WILLIAM CONOVER,
Notary Public, New York County.

STATE OF NEW YORK,
County of New York, ss:

I Peter J. Dooling Clerk of the County of New York and also Clerk of the Supreme Court for the said County the same being a court of Record do hereby certify that William Conover before

whom the annexed deposition was taken was, at the time of taking the same Notary Public of New York dwelling in said County duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes, that I am well acquainted with the handwriting of said Notary and that his signature thereto is genuine as I verily believe.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Court and County the — day of September, 1908.

[State of New York Seal.]

PETER J. DOOLING, *Clerk.*

Filed for Record Oct. 5th, A. D. 1908, 9 A. M. 7-No. 4269439.
ABEL DAVIS, *Recorder.*
Book of Records 10058, page 578.

36 "EXHIBIT K."

"Exhibit K."

In the Matter of the Renewal before Expiration of the Chattel Mortgage from The Tengwall Company to Edward H. Fallows, Trustee.

Affidavit.

STATE OF NEW YORK,
County of New York, ss:

H. N. McClain and Edward H. Fallows, being severally duly sworn, each for himself says: That your deponent, H. N. McClain is the Vice-President and General Manager of The Tengwall Company, a Maine corporation and the mortgagor as hereinafter more particularly set forth, and makes this affidavit in behalf of and as agent of said Company.

That your deponent Edward H. Fallows, is the mortgagee as hereinafter more particularly set forth;

That on the 7th day of October 1905, the said The Tengwall Company made, executed and delivered a mortgage of personal property to the said Edward H. Fallows, Trustee: which said mortgage was subsequently duly recorded in the office of the Recorder of Cook County, State of Illinois, on the 1st day of November 1905, in Book of Records #8689 at page 335 thereof;

That this affidavit is made for the purpose of obtaining a renewal before the expiration of the mortgage of personal property hereinabove referred to pursuant to the laws of Illinois 1903, page 254.

That the interest which Edward H. Fallows as Trustee, the mortgagee under said chattel mortgage, has in the property therein mentioned, is that of Trustee for the holders of the bonds of the said The Tengwall Company outstanding under the mortgage and Trust Deed, dated the 7th day of October 1905 made by the said The Tengwall Company to said Edward H. Fallows as Trustee and secured

by said mortgage and Trust Deed hereinabove mentioned in the property therein mentioned and conveyed to the said Edward H. Fallows by said mortgage.

That said chattel mortgage is for the payment of money and the amount remaining unpaid thereon is Twenty Thou-
37 sand Dollars ($20,000) of principal and interest from the 1st day of April 1909.

That the time when the mortgage will become due is the first day of October 1920.

H. N. McCLAIN.
EDWARD H. FALLOWS.

Sworn to before me by H. N. McClain this 6th day of October A. D. 1909.

[Frank M. Kane, Notary Public, Cook County, Ill.]

FRANK M. KANE,
Notary Public, Cook County, Illinois.

Sworn to before me by Edward H. Fallows this 4th day of October, 1909.

[William Conover, Notary Public, New York County.]

WILLIAM CONOVER,
Notary Public, N. Y. Co.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling Clerk of the County of New York and also Clerk of the Supreme Court for the said County the same being a court of Record do hereby certify that William Conover before whom the annexed deposition was taken was, at the time of taking the same Notary Public of New York, dwelling in said County duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes, that I am well acquainted with the handwriting of said Notary and that his signature thereto is genuine as I verily believe.

In Testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 4th day of Oct. 1909.

[NEW YORK SEAL.] PETER J. DOOLING, *Clerk.*

7—No. 4448856. Filed for record Oct. 6, A. D. 1909, at 1:21 P. M.

ABEL DAVIS, *Recorder.*

Book of Records 10275, page 90.

38

"EXHIBIT L."

Exhibit L.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

This cause this day coming on to be heard upon the petition of Continental and Commercial Trust and Savings Bank, Trustee herein, to sell the assets of the bankrupt free and clear of all liens, if any, against the same, and due notice of the application for this order having been given to the parties in interest, including the Miehle Printing Press Manufacturing Company, and the attorneys for Edward H. Fallows, Trustee, who claim to have liens upon said assets, and after having heard counsel for the respective parties and due deliberation thereon being had, it is ordered that the prayer of said petition be and the same hereby is granted, and the said Trustee is hereby authorized and directed to sell all of the assets of the bankrupt, including all franchises, trade names, trade marks, good will, patents and rights under patents and all other property and rights, exclusive of money and accounts and bills receivable, free and clear of whatever liens may exist against the same, or any part thereof, and that the liens against said assets, or any part thereof, which may exist, shall attach to the proceeds of said sale, and be paid out of such proceeds.

It is further ordered that the Trustee herein shall solicit bids for all of said assets, exclusive of moneys, accounts and bills receivable and report said bids to me, the Referee herein, on Wednesday, September 28th, 1910, at ten o'clock A. M. of that day, and that the said Trustee give lawful notice of said sale and take such further steps to advertise such sale as in its discretion may be fit and proper.

It is further ordered that in case of the rejection of all of said bids, or should no adequate bids be made, or accepted, the Trustee have leave to employ an auctioneer to make a sale of said assets.

39

"EXHIBIT M."

Exhibit M.

In the District Court of the United States for the Northern District of Illinois.

No. 17798.

In the Matter of TENGWALL COMPANY, Bankrupt.

Opinion.

The petition of the trustee sets up that on June 3, 1910 sundry judgments were entered against the bankrupt; that on the same

day executions were issued and given to the sheriff, and thereupon they became liens against the property; prayed for an order that the trustee might be subrogated to the rights of the petitioning creditors, which petition was filed August 18, 1910. Notice was given under said petition, and answer was filed thereto by Edward H. Fallows, trustee, charging that the judgments, etc. entered up were not in good faith; that executions were not issued with intent that they should be levied on the property of the bankrupt, that said executions never became a lien; that the executions in question were entered upon judgment notes; that said judgment notes were executed without proper authority of the board of directors, and each and all — them were void; that they were entered the day preceding the filing of the petition in involuntary bankruptcy and the said notes were made with the knowledge on the part of both Tengwall Company and the payee that bankruptcy proceedings were in contemplation; and it was the intention on the part of the bankrupt as well as the payees that the judgment notes should not be enforced against them by levy of executions; but on the contrary it was the intention that they should be used solely for the purpose of asserting a lien against certain property of the bankrupt, and especially to the prejudice of the rights of the respondent under a chattel mortgage executed by the bankrupt.

That the Tengwall Company was indebted in the sum of $20,000 secured by chattel mortgage, and that all the indebtedness represented by the aforesaid judgments was contracted with full knowledge of the existence of the said chattel mortgage; that the mortgage was in full force and effect on said third day of June, and that the creditors had full knowledge of the said mortgage and had always dealt in connection with contracting the indebtedness represented by said notes on the understanding that the mortgage was a valid lien; charges a scheme between the officers of the bankrupt and the aforesaid judgment creditors, etc.

With reference to the issue presented by the said answer it may be observed that the statute refers to notice being given—Judge Seaman in delivering the opinion of the Circuit Court of Appeals, 7th Circuit, Reardon v. Rock Island Car Co., 22 A. B. R. 26 (p. 31) held that the notice in question was only intended for the benefit of the judgment creditors as being the only parties interested. Here, however, the mortgagee who is hurt by the preservation of the judgment lien interposes an answer. I am of the opinion that whatever rights the mortgagee has are capable of protection when the question arises directly on the validity of his security.

Nevertheless, a hearing was had on said petition and answer, and an order was entered in accordance with the prayer of the petition subrogating the trustee to the rights of the aforesaid judgment creditors.

Subsequently objections were filed by the trustee to the allowance of the claim of the aforesaid mortgagee amounting to $20,000 as a secured claim, the said property having been sold, the lien, if any, of the mortgagees, if any, to attach to the proceeds.

The objection in substance is that the mortgage which was re-

corded on the 1st of November, 1905, purports to have been given to secure coupon bonds of $20,000, payable on the 1st of October, 1920; that on October 5, 1908, an affidavit was filed in the Recorder's Office of Cook County by the Vice-President of the mortgagor and by Edward H. Fallows, trustee and mortgagee, which purported to be in compliance with the Statute, for the extension of the debt secured by said chatttel mortgage; that on October 6th, 1909, another but similar affidavit was filed in the said Recorder's Office to secure a similar extension.

The contention of the Trustee is that under the Chattel Mortgage Act (Section 4, Laws of Illinois, in relation to the renewal of chattel mortgages, Hurd's Revised — 1909, pp. 1520 and 1521); the procuring an extension, required an affidavit to be filed; that if
41 the affidavit were filed it would extend the lien of the mortgage for one year from the date of said filing, but no longer; that there is no provision in said Act extending a chattel mortgage a second time by filing such an affidavit or otherwise; and that even if the statute should be construed as authorizing a second extension that such affidavit for such second extension should have been filed before the expiration of one year from the date of the filing of the first affidavit—in other words, that if under the statute a second extension could be granted the affidavit therefor would have to be filed not later than October 5, 1909; whereas in this case it was filed on the 6th of October.

The contention by counsel for mortgagee is that the extension is a full year to be added to the original three years allowed by the law. To warrant such a construction would be to read into the Act a different phraseology than that given. It says specifically that the time shall "not exceed one year from the date of filing such affidavit."

I am satisfied that the provisions of the Statutes for Chattel Mortgages are to be strictly construed; such is the tenor of the Illinois decisions on the Chattel Mortgage Act; and that the year provided for by the Act cannot be enlarged or altered from the phrasing of the Statute.

I am therefore of the opinion that the contention of counsel for the trustee is correct; that the second filing came a day too late. This dispenses with the second proposition, viz: that there is nothing in the law to warrant a second extension anyway, even if it had been filed within the year. I rather lean to the opinion, from the briefs of counsel submitted to me, that our statute is not broad enough to allow a second extension, even if the affidavit had been filed in due time, but it is not necessary to the decision of this matter as before said, because it was filed a day too late.

The lien of the mortgagee is therefore lost, leaving the claim to be proved as a general claim, if so desired.

I fail to see anything in the proposition that the conduct of the bankrupt's officers in giving judgment notes, even with the intention, as may be perhaps inferred, that the same should be used for the purpose of enabling the trustee to attack the chattel mortgage should be considered as a fraudulent act. It is worth noting, how-

ever, that if this bankruptcy petition had been filed a few days later, to-wit: after the 26th day of June, last instead of a few days before the 26th of June, there would be no question here. This
42 question could not then have been raised because it would have been unnecessary to have adopted any such procedure to attack this mortgage, as the trustee is, by the amendment of the Act, vested with full rights as of an attaching creditor, and he could so have challenged the validity of the mortgage without the interposition of judgments having been actually entered. To accomplish by means of judgment notes a result, a status, which Congress shortly afterwards provided cannot be termed fraudulent.

The First Nat. Bank v. Starke, 15 A. B. R. 639 (U. S. Supreme Ct.); Re Baird, 11 A. B. R. 405; Conti v. Sanceri, 18 A. B. R. 891; Re Economical Printing Co., 6 A. B. R. 615 (C. C. A.) all point to the duty of the court to give the trustee the benefit of the attaching or judgment liens and then Congress passes a law which dispenses with all those steps and says the trustee is ipso facto a judgment creditor, an attaching creditor as of the date of bankruptcy.

I therefore order that the claim of Fallows, trustee, be disallowed as a secured claim.

I call attention to the fact that petition for review must be filed in ten days.

"EXHIBIT N."

"Exhibit N."

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

In the District Court of the United States for the Northern District of Illinois.

In Bankruptcy. No. 17798.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

Exceptions of Edward H. Fallows, Trustee, to Certain Orders of Referee in Bankruptcy.

Now comes Edward H. Fallows, trustee, and exceptions having been duly taken by him to the order of the Referee in Bank-
43 ruptcy entered August 22, 1910, allowing the motion of the Trustee in Bankruptcy for subrogation to the rights of certain judgment creditors and subrogating said Trustee to the rights of said judgment creditors and the order of February 1, 1911 denying the motion of said Fallows to set aside and vacate said order of August 22, 1911, and states in writing said exceptions then made as follows: (1) That the answer of Edward H. Fallows to the petition of said Trustee in Bankruptcy was sufficient, and constituted a good defense to said petition; and (2) that the Referee erred in holding

the answer of Edward H. Fallows, to the petition of the Trustee in Bankruptcy to be insufficient, and in allowing said motion and granting said subrogation; (3) that the said order of the Referee in Bankruptcy was contrary to law, and an abuse of the discretion lodged in the Referee by the Bankruptcy Act.

And said Edward H. Fallows, Trustee, excepts to the order of the Referee in Bankruptcy entered February 1, 1911, disallowing his claim for Twenty-Thousand Dollars ($20,000.00) as a secured claim and holding his certain trust deed or chattel mortgage invalid and states his exceptions as follows: (1) That said order is contrary to law; (2) that said Referee erred in failing to set aside said order allowing said subrogation and in not refusing to hear said objections; (3) the Referee erred in sustaining the objections of the Trustee in Bankruptcy to said claim of petitioner as a secured claim and to the validity of the lien of the trust deed or chattel mortgage executed by said bankrupt, and delivered to and held by your petitioner as security for the payment of his said claim; (4) the Referee erred in sustaining the third objection of the Trustee in Bankruptcy to said trust deed or chattel mortgage and in holding that the second affidavit of renewal of the same was not filed in time, and (5) the Referee erred in not overruling the fourth objection of the Trustee in Bankruptcy to the validity of said trust deed or chattel mortgage and in sustaining said objection, and holding that the lien of said trust deed or chattel mortgage, was invalid as to the property of the bankrupt in the hands of the Trustee in Bankruptcy.

EDWARD H. FALLOWS,
Trustee,
By WILKERSON & CASSELS,
His Attorneys.

44 "EXHIBIT O."

"Exhibit O."

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

In the District Court of the United States for the Northern District of Illinois.

In Bankruptcy. Number 17798.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

Petition of Edward H. Fallows, Trustee, for Review of Referee's Order.

To Honorable Sidney C. Eastman, Referee in Bankruptcy:

Your petitioner most respectfully states:

That your petitioner is a creditor of the bankrupt above named, and claims a lien on property of said bankrupt to secure the

payment of his claim for Twenty Thousand Dollars ($20,000.00) evidenced by two hundred (200) bonds of said bankrupt, each for One Hundred Dollars ($100.00), and as such creditor was a party to proceedings in said bankruptcy, pending before Sidney C. Eastman, Esq., as the Referee in Bankruptcy, in charge thereof, to-wit: the petition and motion by the Trustee in Bankruptcy to be subrogated to the rights of certain judgment creditors of said bankrupt, and (an order having been entered on August 22, 1910, sustaining the objections of the Trustee in Bankruptcy to the answer of this petitioner to the petition of said Trustee in Bankruptcy for such subrogation, allowing said motion, granting the prayer of said petition, and subrogating the said Trustee in Bankruptcy to the rights and liens of said judgment creditors) *and* exception having been taken by petitioner, the objections of the Trustee in Bankruptcy so subrogated to the rights of said judgment creditors, to the secured claim of petitioner, which said objections were duly sustained
45 by said Referee and a final order entered disallowing said claim as a secured claim, and petitioner duly excepted to the entry of said order. Said order allowing said subrogation, and the order refusing to grant the motion to set aside said order of subrogation, is erroneous in this: (1) that the answer of this petitioner to the petition of said Trustee in Bankruptcy was sufficient, and constituted a good defense to said petition; and (2) that the Referee erred in holding the answer of this petitioner to the petition of the Trustee in Bankruptcy to be insufficient, and in allowing said motion and granting said subrogation; (3) that the said order of the Referee in Bankruptcy was contrary to law, and an abuse of the discretion lodged in the Referee by the Bankruptcy Act. Said final order disallowing said secured claim is erroneous in this: (1) that said order is contrary to law; (2) that said Referee erred in failing to set aside said order allowing said subrogation and in not refusing to hear said objections; (3) the Referee erred in sustaining the objections of the Trustee in Bankruptcy to said claim of petitioner as a secured claim and to the validity of the lien of the trust deed or chattel mortgage executed by said bankrupt, and delivered to and held by your petitioner as security for the payment of his said claim; (4) the Referee erred in sustaining the third objection of the Trustee in Bankruptcy to said trust deed or chattel mortgage and in holding that the second affidavit of renewal of the same was not filed in time, and (5) the Referee erred in not overruling the fourth objection of the Trustee in Bankruptcy to the validity of petitioner's trust deed or chattel mortgage and in sustaining said objection, and holding that the lien of said trust deed or chattel mortgage, was invalid as to the property of the bankrupt in the hands of the Trustee in Bankruptcy.

Wherefore, your petitioner prays that said orders may be reviewed and reversed and that he may be restored to all things which he has lost by reason of said error.

EDWARD H. FALLOWS,
Trustee, Petitioner.
By WILKERSON & CASSELS,
His Attorneys.

46 STATE OF ILLINOIS,
County of Cook, ss:

Edwin H. Cassels being duly sworn on oath, says that he is the duly authorized agent in this behalf of Edward H. Fallows, Trustee, the above named petitioner, and makes this affidavit for said petitioner in his behalf; that the averments of fact in the above and foregoing petition are true, and as to the other averments of said petition, deponent verily believes them to be true.

EDWIN H. CASSELS.

Subscribed and sworn to before me this 9th day of February, A. D. 1911.

EARL D. HOSTETTER,
Notary Public, Cook County, Illinois.

Endorsed: No. 17798. In the District Court of the United States for the Northern District of Illinois. In the matter of The Tengwall Company, Bankrupt. Certificate for Review. Sidney C. Eastman, Referee in Bankruptcy. Filed Mar. 9, 1911. T. C. MacMillan, Clerk.

And afterwards, to wit, on the 13th day of March, A. D. 1911, the following order was had and entered of record in said cause, to wit:

17798.

In re THE TENGWALL COMPANY, Bankrupt.

Order of Mar. 13, 1911.

On motion it is Ordered by the court that the hearing of the petition of Edward H. Fallows for a review of the referee's findings herein be set for Monday, March 20, 1911.

And afterwards, to wit, on the 21st day of March, A. D. 1911, the following order was had and entered of record in said cause, to wit:

47 Hearing.

17798.

In re THE TENGWALL CO., Bankrupt.

This matter coming on to be heard on the petition to review the order of the referee in the matter of the chattel mortgage of Fallow, come the parties by their attorneys and after having heard the arguments of counsel the court not being sufficiently advised in the premises takes time to consider.

And afterwards, to wit, on the 28th day of March, A. D. 1911, the following order was had and entered of record in said cause, to wit:

17798.

In re TENGWALL COMPANY, Bankrupt.

Order of Mar. 28, 1911.

Come the parties by their solicitors and the court having considered and being now fully advised in the matter of the petition for a review of the referee's order on the application of the trustee to be subrogated to the rights of certain judgment creditors, it is Ordered that said petition be and the same hereby is denied, and that the report of the referee be and the same hereby is approved.

And afterwards, to wit, on the 6th day of April, A. D. 1911, the following order was had and entered of record in said cause, to wit:

17798.

In re THE TENGWALL COMPANY, Bankrupt.

Order of Apr. 6, 1911.

On motion leave is given E. H. Fallows, Trustee, to file exceptions to the order heretofore entered herein on March 28, 1911, nunc pro tunc March 28, 1911.

48 And afterwards, to wit, on the 6th day of April, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, Exceptions of Petitioner; same being in the words and figures following, to wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Bankruptcy. Number 17798.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

Filed Apr. 6, 1911.

In the Matter of the Petition of Edward H. Fallows, Trustee, for a Review of the Order of Sidney Corning Eastman, Esq., Referee in Bankruptcy Disallowing the *the* Claim of Petitioner as a Secured Claim, and Holding to be Void a Certain Trust Deed or Chattel Mortgage.

Exceptions of Petitioner.

Now comes Edward H. Fallows, Trustee, the petitioner aforesaid, and excepts to the order of the court duly entered in the above en-

titled matter on the 28th day of March, A. D. 1911, approving the order and judgment of said Referee in Bankruptcy, denying the motion of the petitioner to set aside a certain order of subrogation entered on August 22, 1910, and disallowing the claim of your petitioner as a secured claim and denying the prayer of said petition for review, and states his grounds of exceptions as follows:

First. The court erred in affirming the order of the Referee in granting said petition of the Trustee in Bankruptcy for the preservation of the judgment liens in said petition for review referred to, and for the subrogation of the Trustee in Bankruptcy to the rights of said lienors, entered on the 22d day of August, 1910.

Second. The court erred in not holding that the Referee in Bankruptcy in entering said order of August 22, 1910, abused the discretion lodged in him by the statute in granting and entering said order.

Third. The District Court erred in affirming the order and
49 judgment of the Referee; sustaining the objection of said Trustee in Bankruptcy to the validity of the lien of said trust deed or chattel mortgage and in refusing to allow said claim of your petitioner as a secured claim.

Fourth. The District Court erred in failing to adjudge said trust deed or chattel mortgage executed by the said bankrupt and delivered to your petitioner on the 7th day of October, 1905, to be a valid and subsisting lien on the assets of said bankrupt, and upon the proceeds of the sale of said assets.

Fifth. Said order of said District Court was erroneous in matter of law in that it did not direct the Referee in Bankruptcy to overrule the objections of said Trustee in Bankruptcy to the validity of said trust deed or chattel mortgage, and in that it did not direct said Referee in Bankruptcy to allow said claim of your petitioner as a secured claim, and in that it did not direct said Referee in Bankruptcy to vacate and set aside said order of subrogation entered as aforesaid on the 22d day of August, 1910.

Respectfully submitted,

WILKERSON & CASSEL,

Attorneys for Edward H. Fallows, Trustee, Claimant.

Endorsed: Number 17798. District Court of the U. S. Northern District of Illinois, Eastern Division. In re The Tengwall Company, Bankrupt. Exceptions of Petitioner. Filed April 6, 1911, at 10 o'clock A. M. T. C. MacMillan, Clerk.

And afterwards, to wit, on the 6th day of April, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Petition; same being in the words and figures following, to wit:

50 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Bankruptcy. No. 17798.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

Petition.

Filed Apr. 6, 1911.

Now comes Edward H. Fallows, Trustee, and feeling aggrieved at the order of the District Court of United States duly entered on the 28th day of March, A. D. 1911, denying petitioner's petition for a review of an order entered in the above entitled cause by Referee in Bankruptcy, Sidney C. Eastman, Esq., on the first day of February, A. D. 1911, prays an appeal from said order of the District Court of the United States to the United States Circuit Court of Appeals for the Seventh Circuit, and states as his grounds for said appeal that the court erred in important matters of law in entering said order, which said errors are stated in certain assignments of error, a copy of which is attached hereto, and made a part hereof.

EDWARD H. FALLOWS,
Trustee, Petitioner.
By EDWIN H. CASSELS,
WILKERSON & CASSELS,
Attorneys for said Petitioner.

51 STATE OF ILLINOIS,
County of Cook, ss:

Edwin H. Cassels being first duly sworn on oath, says that he is the duly authorized agent in this behalf of Edward H. Fallows, Trustee, the above named petitioner; that said Fallows is a resident of Dobb's Ferry, in the State of New York, and is not within the Northern District of Illinois, or within the State of Illinois; that he has read the foregoing petition by him subscribed, and that the same is true in substance and in fact.

EDWIN H. CASSELS.

Subscribed and sworn to before me this 6th day of April, A. D. 1911.

[SEAL.] EARL D. HOSTETTER,
Notary Public, Cook County, Illinois.

(Copy of Assignment of Errors attached to original Petition for Appeal, omitted in this transcript, as it appears elsewhere.)

Endorsed: Number 17798. District Court of the U. S. Northern District of Illinois. Eastern Division. In re The Tengwall Company, Bankrupt. Petition. Filed April 6, 1911 at 10 o'clock A. M. T. C. MacMillan, Clerk.

And afterwards, to wit, on the 6th day of April, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, Assignment of Errors; same being in the words and figures following, to wit:

52 Filed Apr. 6, 1911.

In the United States Circuit Court of Appeals for the Seventh Circuit.

In Bankruptcy. No. 17798.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

Appeal of Edward H. Fallows, Trustee.

Assignment of Errors.

Now comes Edward H. Fallows, Trustee, the appellant above named, and being aggrieved at the order and judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered in the above entitled matter on the 28th day of March, 1911, approving the order and judgment of Referee in Bankruptcy, Sidney C. Eastman, Esq., denying the motion of petitioner to set aside and vacate a certain order of subrogation entered on August 22, 1910, and disallowing the claim of appellant as a secured claim and denying the prayer of the petition of appellant for a review of said order and judgment of said Referee in Bankruptcy, assigns as errors of the said District Court in entering said order and judgment as follows:

First. The Court erred in affirming the order of the Referee in granting said petition of the Trustee in Bankruptcy for the preservation of the judgment liens in said petition for review referred to, and for the subrogation of the Trustee in Bankruptcy to the rights of said lienors, entered on the 22d day of August, 1910.

Second. The court erred in not holding that the Referee in Bankruptcy in entering said order of August 22, 1910, abused the discretion lodged in him by the statute in granting and entering said order.

Third. The District Court erred in affirming the order and judgment of the Referee; sustaining the objections of said Trustee in Bankruptcy to the validity of the lien of said trust deed or chattel mortgage and in refusing to allow said claim of your petitioner as a secured claim.

Fourth. The District Court erred in failing to adjudge said trust deed or chattel mortgage executed by the said bankrupt and delivered to your petitioner on the 7th day of October, 1905, to be a valid and subsisting lien on the assets of said bankrupt and
53 upon the proceeds of the sale of said assets.

Fifth. Said order of said District Court was erroneous in matter of law in that it did not direct the Referee in Bankruptcy

to overrule the objections of said Trustee in Bankruptcy to the validity of said trust deed or chattel mortgage, and in that it did not direct said Referee in Bankruptcy to allow said claim of your petitioner as a secured claim, and in that it did not direct said Referee in Bankruptcy to vacate and set aside said order of subrogation entered as aforesaid on the 22d day of August, 1910.

Wherefore, appellant respectfully prays that said order of the District Court of the United States entered on March 28, 1911, may be reversed and said matter remanded with directions to correct said errors, to grant the prayer of said petition for review, to allow said claim of your petitioner as a secured claim and to declare said claim to be a valid and subsisting lien upon the proceeds of the sale of the assets of said bankrupt now in the hands of the Trustee in Bankruptcy.

JAMES H. WILKERSON AND
EDWIN H. CASSELS,
Attorneys for said Appellant.

Endorsed: No. 17798. U. S. Circuit Court of Appeals, Seventh Circuit. In the matter of The Tengwall Company, Bankrupt. Appeal of Edward H. Fallows, Trustee. Assignment of Errors. Filed April 6, 1911 at 10 o'clock A. M. T. C. MacMillan, Clerk.

And afterwards, to wit, on the 6th day of April, A. D. 1911, the following order was had and entered of record in said cause, to wit:

17798.

In re THE TENGWALL CO., Bankrupt.

Order of Apr. 6, 1911.

Comes Edward H. Fallows, claimant by his solicitors and on their motion it appearing that said Fallows has filed his assignment of errors and petition for appeal, it is Ordered that said petition praying for an appeal to the United States Circuit Court of Appeals from the order heretofore entered herein on March 28, 1911, be and the same hereby is allowed and that the amount of the appeal bond be fixed at the sum of two hundred fifty dollars.

54 Filed Apr. 7, 1911.

And afterwards, to wit, on the 7th day of April, A. D. 1911, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Bond on Appeal; same being in the words and figures following, to wit:

Know All men by These Presents, That we, Edward H. Fallows, Trustee, as Principal, and Empire State Surety Company, as sureties, are *eh*ld and firmly bound unto Continental and Commercial Trust and Savings Bank, Trustee in Bankruptcy of The Tengwall Company, bankrupt, in the full and just sum of two hundred fifty (250)

dollars to be paid to the said Continental and Commercial Trust and Savings Bank, Trustee in Bankruptcy of The Tengwall Company, bankrupt, its successors, attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this sixth day of April, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division thereof in a controversy in a bankruptcy proceeding in said Court, between Edward H. Fallows, a claimant, claiming a lien on the property of said bankrupt and said Trustee in Bankruptcy who denied the validity of said lien and objected to the allowance of claimant's claim, as a secured claim, a decree was rendered against the said Edward H. Fallows, Trustee, holding the said lien claimed by him to be invalid and disallowing said claim as a secured claim, but permitting claimant to file said claim as an unsecured claim and the said Edward H. Fallows, Trustee having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the said Continental and Commercial Trust and Savings Bank, Trustee in Bankruptcy of The Tengwall Company, bankrupt, citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said Edward H. Fallows, Trustee shall prosecute his said appeal to effect, and shall answer all damages and costs that may be
55 awarded against him if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

EDWARD H. FALLOWS, *Trustee,*
By EDWIN H. CASSELS,
Attorney in Fact.
THE EMPIRE STATE SURETY COMPANY.
WALTER FARODAY,
Resident Vice-President.
R. KUNSHEFSKY,
Resident Assistant Secretary.

Sealed and delivered in presence of
EARL D. HOSTETTER.

Approved by—
[SEAL.] CARPENTER, *Judge.*

7 April, 1910.

Endorsed: 17798. District Court of the United States, Northern District of Illinois Eastern Division. In the matter of The Tengwall Company, Bankrupt. Appeal of Edward H. Fallows, Trustee. Edward H. Fallows, Trustee, Appellant vs. Continental & Commercial Trust & Savings Bank, Trustee in Bankruptcy, etc. Appellee. Bond on Appeal. Filed April 7, 1911 at 2 o'clock P. M. T. C. MacMillan, Clerk.

Certificate of Clerk.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record in Case No. 17798, The Tengwall Company, Bankrupt, prepared in accordance with Præcipe filed herein, as same appears from the records and files in said cause now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office at Chicago, in said District, this 26th day of April, A. D. 1911.

[SEAL.] T. C. MACMILLAN, *Clerk.*

56 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 55, inclusive, contain a true copy of the printed record, printed under my supervision, and filed July 18, 1911, on which this cause was argued, heard and determined in the case of In the Matter of The Tengwall Company, Bankrupt, Edward H. Fallows, Trustee, vs. Continental & Commercial Trust & Savings Bank, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, No. 1811, October Term, 1910, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fourteenth day of November A. D. 1912.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

57 At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit Begun and Held in the United States Court-room, in the City of Chicago, in said Seventh Circuit, on the Fourth Day of October, 1910, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Ten and of Our Independence the One Hundred and Thirty-fifth Year.

And afterwards, to-wit: On the fifth day of May, 1911, in the October Term last aforesaid, came the Appellant, by his counsel, Mr. Edwin H. Cassels and Mr. Francis Adams, Jr., and filed in the office of the Clerk of this Court their certain Appearance, which is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1910.

No. 1811.

EDWARD H. FALLOWS, Trustee,
vs.
CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee.

The Clerk will enter my appearance as counsel for the Appellant.
EDWIN H. CASSELS.
FRANCIS ADAMS, JR.

Endorsed: Filed May 5, 1911. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the fifth day of May, 1911, in the October Term last aforesaid, came the Appellee by its counsel, Mr. Herman Frank, and filed in the office of the Clerk of this Court, his certain Appearance, which is in the words and figures following, to-wit:

58 United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1910.

No. 1811.

EDWARD H. FALLOWS, Trustee, Appellant,
vs.
CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee, Appellee.

The Clerk will enter my appearance as counsel for the Appellee.
HERMAN FRANK.

Endorsed: Filed May 5, 1911. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the tenth day of August, 1911, in the October Term last aforesaid, came the Appellant, by his counsel,

Mr. Edward J. Brundage, and filed in the office of the Clerk of this Court, his certain Appearance, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1910.

No. 1811.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

EDWARD H. FALLOWS, Trustee, Appellant,
vs.
CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, Appellee.

Appearance.

59 I hereby enter my appearance as one of the counsel for appellant in the above entitled cause.

EDWARD J. BRUNDAGE.

Endorsed: Filed Aug. 10, 1911. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the tenth day of August, 1911, in the October Term last aforesaid, came the Appellee, by its counsel Mr. Percy B. Davis, and filed in the office of the Clerk of this Court, his certain Appearance, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1911.

No. 1811.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

EDWARD H. FALLOWS, Trustee, Appellant,
vs.
CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, Appellee.

Appearance.

I hereby enter my appearance as one of the counsel for appellee in the above entitled cause.

PERCY B. DAVIS.

Endorsed: Filed Aug. 10, 1911. Edward M. Holloway, Clerk.

60 At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit Begun and Held in the United States Court-room, in the City of Chicago, in said Seventh Circuit, on the Third Day of October, 1911, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Eleven and of Our Independence the One Hundred and Thirty-sixth Year.

And afterwards, to-wit: On the twenty-third day of April, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *April* 23, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Kenesaw M. Landis, District Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

Before Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge; Hon. Christian C. Kohlsaat, Circuit Judge.

In the Matter of THE TENGWALL CO., Bankrupt.

EDWARD H. FALLOWS, Trustee, etc.,
vs.
CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on May 7, 1912.

61 And afterwards, to-wit: On the seventh day of May, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *May* 7, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1811.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

EDWARD H. FALLOWS, Trustee, etc.,
vs.
CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Edward H. Cassels, counsel for appellant, and by Mr. Herman Frank, counsel for appellee, and the Court having heard the same takes this matter under advisement.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Courtroom, in the City of Chicago, in said Seventh Circuit, on the First Day of October, 1912, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Twelve and of Our Independence the One Hundred and Thirty-seventh Year.

62 And afterwards, to-wit: On the eighth day of October, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which is in the words and figures following, to-wit:

63 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1811.

In re THE TENGWALL COMPANY, Bankrupt.

EDWARD H. FALLOWS, Trustee, Appellant,
vs.
CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, Trustee in Bankruptcy of Tengwall Company, Bankrupt, Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

From the report of the referee, it appears that on June 4, 1910, Barnhart Bros. & Spindler, among others, filed their petition praying that The Tengwall Company be declared a bankrupt; that on June 17, 1910, said company was adjudicated a bankrupt; that on August 9, 1910, said trust company was duly chosen and qualified as trustee,—that on the same day appellant filed his claim as a secured creditor, basing the same upon a mortgage; that certain creditors having obtained judgments and executions and placed the same in the hands of the sheriff for service within the four months period, the trustee filed its petition asking for an order preserving the liens of such creditors for the benefit of said bankrupt estate and for the subrogation of the trustee in bankruptcy to the rights of the judgment creditors; that on August 22, 1910, appellant filed his answer to said petition; that on the same day said answer was found to be insufficient by the referee and the trustee in bankruptcy was subrogated to the rights of the execution creditors as prayed, to which order appellant saved an exception; that thereafter the trustee in bankruptcy filed objections to appellant's alleged secured claim; that said claim was based upon two hundred bonds for $100 each—$20,000—bearing 5% interest and maturing October
64 1, 1920, and secured by mortgage dated October 7, 1905, conveying to appellant as trustee, the franchises, licenses, and articles of personal property, goods, chattels, viz., all the franchises, licenses, rights and privileges of running and operating its plant, also all the fixtures, implements, goods, wares, and merchandise, and all other articles of personal property now belonging to and in the possession of said company. The Tengwall Company was given leave to alter any of the machinery, fixtures, or other equipment, and substitute new, which, when substituted, should forthwith become subject to the lien of the mortgage. It further appears that on or about November 9, 1905, the Tengwall plant was partially destroyed by fire, for which fire insurance was collected and, with appellant's consent, employed in replacing the said machinery, fixtures, stock in trade, etc., which was burned; that with the exception of said stock in trade, said plant remained in the possession of

the Tengwall Company practically unchanged from the time of replacement until taken possession of by the trustee in bankruptcy; except as to certain repairs and two printing presses subsequently added; that the property was sold clear of liens, including that of appellant, and the same were relegated to the proceeds; that the sale aggregated $24,134.03, of which sum, the proceeds of the stock in trade amounted to $5,000, the good will, $1,800, the patents, $600, and the balance was realized on the equipment, etc.. The referee further finds that the bankrupt had always recognized the validity of said mortgage and paid the interest on said bonds; that appellant filed his motion to set aside the order of August 22, 1910, which was denied; that the trustee in bankruptcy filed objections to appellant's claim, as aforesaid, alleging as ground therefor that on October 5, 1908, just before the expiration of the three years, during which the chattel mortgage was a valid lien, appellant filed an affidavit in the recorder's office in compliance with the statutes of Illinois for the extension of the mortgage debt. It is assumed that it was the intention to extend the lien of the mortgage, since the debt was not due.

It further appears that on October 6, 1909, another and similar affidavit was filed to secure a second extension. It was the contention of the trustee in bankruptcy that the Illinois statute makes no provision for a second extension, and that, in any event, the affidavit was not filed in time; that it should have been filed within the year ending October 5, 1909, and the referee so held. He also held that the chattel mortgage had ceased to be a lien as
65 against third persons after October 5, 1909; that the liens of the creditors' judgments were valid and enured as such to the trustee for the benefit of the creditors, as against the chattel mortgage.

Thereafter, appellant filed his petition for a review, which the referee granted. The grounds relied on in the petition are: (1) That appellant's answer to the petition for subrogation was sufficient, and constituted a good defense thereto; (2) That the action of the referee in that respect was an abuse of discretion, and contrary to law; (3) That the referee erred in holding that appellant's second affidavit for an extension was not filed in time, and (4) in holding that appellant's lien was not superior to that of the execution creditors.

On the hearing of said petition for review, the district court denied the same, and approved the referee's report. Exceptions to the order of the district court were filed and overruled, and this appeal resulted. The errors assigned are:

(1) The court erred in sustaining the order of the referee preserving said execution liens and subrogating the trustee as aforesaid;

(2) The court erred in not holding that the referee had abused the discretion lodged in him by statute;

(3) The court erred in affirming the order of the referee sustaining the trustee's objection to the validity of appellant's lien;

(4) The court erred in not setting aside the order for subrogation. Further facts appear in the opinion.

Before Baker, Seaman, and Kohlsaat, Circuit Judges.

KOHLSAAT, *Circuit Judge*, delivered the opinion of the court:

This is a controversy to determine which of two liens is entitled to priority against the property of a bankrupt. Appellant, as trustee, represents the holders of two hundred bonds for $100 each, bearing interest at the rate of 5%, dated October 7, 1905, and maturing October 1, 1920, secured by a chattel mortgage on all the plant of the bankrupt, including the stock in trade. It will be noted that the indebtedness runs for a period of practically fifteen years, while under the laws of Illinois a chattel mortgage is valid for only three years. In their efforts to keep said bonds secured, the parties resorted to the provisions of Sec. 4 of Chapter 95, Hurd's Revised Statutes of Illinois, wherein it is provided that by filing in the recorder's office and with the justice of the peace who took the acknowl-
66 edgment an affidavit within thirty days of the maturity of the debt, setting forth the mortgagee's interest in the mortgaged property, and the amount remaining unpaid thereon, and the time when the same will become due by extension or otherwise, "the lien of the mortgage shall be continued and extended for and during the term of one year from the filing of such affidavit, or until the maturity of the indebtedness or extension thereof secured by said mortgage, Provided such time shall not exceed one year from the date of filing such affidavit.

This affidavit was filed on October 5, 1908. Thereafter, and on October 6, 1909, a second and similar affidavit was filed. On the strength of these renewals, appellant contends that his mortgage constituted a valid lien at the date of the institution of bankruptcy proceedings.

Appellee represents, inter alia, the rights of the bankrupt's creditors acquired under and by virtue of several executions issued upon judgments obtained by certain creditors and placed by them in the hands of the sheriff for service, to the claims of whom appellee has been subrogated under the provisions of Sec. 76c of the Bankruptcy Act.

It appears that on June 3, 1910, six judgments, aggregating more than $25,000 were entered by confession in the Superior Court of Cook County on judgment notes that day executed by the bankrupt. Upon these, executions were at once taken out and placed in the hands of the sheriff, according to the petition. The referee finds they were so placed for service. They never were served, as the bankruptcy proceedings were instituted on June 4, the next day.

It is appellant's contention that these executions never became a lien; that they were secured through connivance of the parties, were never placed in the sheriff's hands for service, but to be held by him.

While the transaction bears some evidence of an intent to take advantage of the delay of appellant in securing an extension of his lien, there is no claim that the sums represented by the judgment notes were not just claims, and we are not at liberty to disregard the

finding of the referee that the executions were placed in the sheriff's hands for service.

Appellant distinguishes between executions placed in the sheriff's hands for service and those placed there to be executed. Undoubtedly, the delivery to the sheriff must not be a limited delivery. Hurd's Rvised Statutes of Illinois (1909), p. 1364; Gilmore v. Davis, 84 Ill. 487; Western Union Cold Storage Co. v. Rose, 60
67 Ill. App. 452; Freeman on Executions, (3rd Ed.) Vol. 2, § 206, p. 1030.

In the present case, however, there is an utter lack of evidence preserved in the record to show any attempt on the part of the judgment creditors to limit the duty of the sheriff. The Illinois statute seems to contemplate two duties on the part of the sheriff in regard to executions placed in his hands: (1) serving of notice of execution; (2) levying. Hurd's Revised Statutes of 1909.

In Cook v. Scott, 1 Gilm. 333; Davis v. Chicago Dock Co. 129 Ill. 180; Bingham v. Maxey, 15 Ill. 290; Boggess v. Pennell, 46 Ill. App. 150; Hamilton v. Quimby, 46 Ill. 90, it is held that it is the duty of the sheriff to serve notice thereof and make a demand upon the debtor before making a levy. Appellant cites these in support of his contention that service does not include levy. We think, however, that in the present case the two are identical. In Peck v. City National Bank, 51 (Mich.) 353, it is said:

"Service of an execution includes every act and proceeding necessary to be taken by the sheriff to make the money and includes the sale of the property when necessary."

The word has been defined to mean "execution of process." 35 Cyc. 1432. This construction seems to us reasonable in the case before us. It would be placing a strained meaning upon the transaction to hold that when a party places an execution in the hands of a process officer, the latter is not charged with the duty, without further instructions, to proceed to make the money called for by the writ, which itself commands him to do so. In the absence of directions not to levy, it is the duty of the officer to obey the directions and commands of the writ. Nor is the duty waived by refusal of plaintiff to give directions. Koran v. Roemheld, 6 Ill. App. 275; Sweetser v. Matson, 153 Ill. 568, 17 Cyc. 1058.

We, therefore, hold the liens of the executions here involved to be valid as against the bankrupt as of June 3, 1910. The last attempt at an extension of appellant's lien was on October 6, 1909, so that there is no question of liens attaching during the period intervening the first and second renewals. If it was within the power of the appellant to reinstate the mortgage lien after it had expired by again filing the affidavit required by the statute in order to secure the first extension, then its lien was valid as against the executions. The matter is, therefore, narrowed down to the question whether appellant acquired a lien valid against subsequent execution
68 liens by taking action a day after the prescribed period for such action. It is a well settled rule of law that the statute in regard to chattel mortgages is in derogation of the common law, and should be strictly followed. Porter v. Dement, 35 Ill. 478. This has been

applied to extensions. Griffin v. Henry, 99 Ill. App. 284. There can be no doubt but that the statute requires the extension in any case to be effected during the life of the mortgage. The language is unmistakably clear. No reason is perceived why this requirement should not be vital. It has been so held. In re New York Economical Printing Co., Bankrupt, 6 A. B. R. 617 (2nd Cir. Ct. of Appeals). Jones on Chattel Mortgages (5th Ed. p. 287). The latter states:

"A chattel mortgage which has ceased to be valid by a failure to file it as required by law cannot be revived by any act of the parties so as to give it priority over other liens."

It is further supported by Seaman v. Eager, 16 Ohio St. 209; Nitchie v. Townsend, 4 N. Y. Sup. Ct. 229.

As between the mortgagor and mortgagee, no recording is necessary. As we construe the mortgage act, appellant had nothing more than an unrecorded chattel mortgage. As regards third persons, he had no lien or priority. As between his mortgage and the lien of the executions here under consideration, his rights were secondary. The decree of the District Court is—

Affirmed.

A true Copy.
Teste:

____ ____,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

69 And afterwards on the same day, to-wit: On the eighth day of October, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *October* 8, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1811.

In the Matter of THE TENGWALL CO., Bankrupt.

EDWARD H. FALLOWS, Trustee,

vs.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee in Bankruptcy of Tengwall Company, Bankrupt.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order or decree of the said District Court in this cause appealed from be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the fourth day of November, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court, a certain Petition for Appeal, which is in the words and figures following, to-wit:—

70 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1811.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

EDWARD H. FALLOWS, Trustee, Appellant,

vs.

CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, Appellee.

Petition for Appeal to the Supreme Court of the United States from the United States Court of Appeals for the Seventh Circuit.

The above named appellant, petitioner herein, Edward H. Fallows, Trustee, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Seventh Circuit, and that a judgment has therein been rendered upon the 8th day of October, 1912, affirming the decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, and that the matter in controversy in said suit exceeds Five Thousand ($5,000.00) Dollars, besides costs; that the judgment entered in this cause by the United States Circuit Court of Appeals for the Seventh Circuit is a final judgment, and is a judgment that may be reviewed by the Supreme Court of the United States, on appeal.

Wherefore, the said appellant prays that an appeal may be allowed him in the above entitled cause, to the Supreme Court of the United States and that an order be entered directing the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit to send the record and proceedings in said cause with all
71 things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellant, may be reviewed, and, if error be found, corrected, according to the laws and customs of the United States.

EDWARD H. FALLOWS,
Trustee, Appellant.
By EDWARD J. BRUNDAGE,
EDWIN H. CASSELLS,
FRANCIS ADAMS, JR.,
Attorneys for Appellant.

Endorsed: Filed Nov. 4, 1912. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the fourth day of November, 1912, in the October term last aforesaid, there was filed in the office of the Clerk of this Court, a certain Assignment of Errors, which is in the words and figures following, to-wit:—

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1811.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

EDWARD H. FALLOWS, Trustee, Appellant,
vs.
CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, Appellee.

Assignment of Errors.

The appellant in the above entitled cause, in connection with his petition for appeal herein, presents and files therewith, his assignment of errors as to which matters and things he says that the decree entered herein on the 8th day of October, 1912, is erroneous, to-wit:

72 First. That the United States Circuit Court of Appeals erred in affirming the judgment of the District Court of the United States for the Northern District of Illinois (Eastern Division) in approving the order of the Referee in Bankruptcy, preserving the alleged liens of the judgment creditors, and in subrogating the Trustee in Bankruptcy to all rights thereunder.

Second. That the United States Circuit Court of Appeals erred in affirming the judgment of the District Court of the United States in holding that said judgment creditors obtained by their judgments and executions issued thereon, a lien on the property of the bankrupt, it not appearing that the said executions were delivered to the sheriff to be executed.

Third. That the United States Circuit Court of Appeals erred in affirming the judgment of the District Court of the United States in holding that said judgment creditors had any liens or rights under their judgments which were in any way superior to, or which took precedence over, the lien of appellant's trust deed.

Fourth. That the United States Circuit Court of Appeals erred in holding that appellant's trust deed did not operate to create a valid first lien on the property of the bankrupt, valid and subsisting at the time of the filing of the petition in bankruptcy, and at all times thereafter.

Fifth. That the United States Circuit Court of Appeals erred in affirming the judgment of the District Court of the United States in holding that the trust deed of appellant was not a valid deed of trust and subsisting lien, according to its tenor, on all the
73 property of said bankrupt, valid as against the alleged liens of the judgments, and as against the appellee, subrogated to

all rights thereunder, and as well against the general creditors of the bankrupt.

EDWARD H. FALLOWS,
Trustee, Appellant.
By EDWARD J. BRUNDAGE,
EDWIN H. CASSELS,
FRANCIS ADAMS, JR.,
His Attorneys.

Endorsed: Filed Nov. 4, 1912. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the fourth day of November, 1912, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

MONDAY, *November* 4, 1912.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. William H. Seaman, Circuit Judge, presiding.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

1811.

In the Matter of THE TENGWALL CO., Bankrupt.

EDWARD H. FALLOWS, Trustee,
vs.
CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee in Bankruptcy of Tengwall Company, Bankrupt.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be, and is hereby allowed as prayed, upon the filing of a bond in the sum of Two hundred Fifty Dollars ($250.00) to be approved by the Clerk of this Court.

74 And afterwards, to-wit: On the sixth day of November, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court, a certain Bond, which is in the words and figures following, to-wit:—

Know all men by these presents, That we, Edward H. Fallows, Trustee, as Principal, and American Surety Company of New York, as surety, are held and firmly bound unto Continental and Commercial Trust Savings Bank, Trustee in Bankruptcy of The Tengwall Company, bankrupt, in the full and just sum of two hundred fifty (250) dollars to be paid to the said Continental and Commer-

cial Trust and Savings Bank, Trustee in Bankruptcy of The Tengwall Company, bankrupt, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this sixth day of November, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a session of United States Circuit Court of Appeals for the Seventh Circuit in a controversy in a bankruptcy proceeding in said Court of Appeals between Edward H. Fallows, Trustee, Appellant, and said Continental and Commercial National Bank, Trustee in Bankruptcy, Appellee, a judgment was rendered affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, and the said appellant has filed a petition for an appeal from said judgment to the Supreme Court of the United States to reverse said judgment rendered by the United States Court of Appeals, which said appeal has been allowed on his filing an appeal bond in the sum of Two Hundred fifty ($250.00) Dollars.

Now, the condition of the above obligation is such, That if the said Edward H. Fallows, Trustee shall prosecute his said appeal to effect, and shall answer all damages and costs that may be
75 awarded against him if he fail to make his appeal good, then the above obligation to be void, otherwise to remain in full force and virtue.

EDWARD H. FALLOWS, *Trustee*,
By EDWIN H. CASSELS, *Attorney in Fact*.
AMERICAN SURETY COMPANY OF NEW YORK,
By WALTER FARADY, *Res. Vice-Pres't*.

Attest:

R. F. BENNETT, [SEAL.]
Res. Ass't Sec'y.

Sealed and delivered in presence of

——— ———.
——— ———.

Approved by
WM. H. SEAMAN, *Judge*.

Approved
EDWARD M. HOLLOWAY, *Clerk*.

Endorsed: Filed Nov. 6, 1912. Edward M. Holloway, Clerk.

76 And afterwards on the same day, to-wit: On the sixth day of November, 1912, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court, a certain Notice, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1811.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

EDWARD H. FALLOWS, Trustee, Appellant,
vs.
CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Notice.

To Messrs. Herman Frank and Percy B. Davis, Att'ys for Continental & Commercial Trust and Savings Bank, Trustee in Bankruptcy of The Tengwall Company, Bankrupt:

Please take notice that on Monday, the 4th day of November, A. D. 1912, at ten o'clock a. m. or as soon thereafter as counsel can be heard we shall appear before their Honors, the United States Circuit Court of Appeals of the 7th Circuit, in the room usually occupied by said Court of Appeals as a Court Room in the Federal Building, in the City of Chicago, (or in Chambers if said Court be not in formal session) and on behalf of Edward H. Fallows, Trustee, pray an appeal from the judgment heretofore rendered by the said United States Circuit Court of Appeals in the above entitled cause, to the Supreme Court of the United States, and shall ask that said Court file
77 its findings of fact and conclusions of law, as provided by Rule 36, Paragraph 3, General Orders in Bankruptcy, and that on the filing of such findings of fact and conclusions of law, the petitioner, said Edward H. Fallows, Trustee, have leave to file additional and supplementary assignments of error.

EDWARD J. BRUNDAGE,
EDWIN H. CASSELS &
FRANCIS ADAMS, JR.,
Attorneys for said Edward H. Fallows, Trustee.

Received a copy of the foregoing notice this 2nd day of November, A. D. 1912.

PERCY B. DAVIS.
HERMAN FRANK.

Endorsed: Filed Nov. 6, 1912. Edward M. Holloway, Clerk.

78 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 21, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel and stipulations relating thereto) in the case of In the Matter of The Tengwall Company, Bankrupt, Edward H. Fallows, Trustee, vs. Continental & Commercial Trust & Savings Bank, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, No. 1811, October Term, 1910, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fourteenth day of November A. D. 1912.

[Seal United States Circuit Court of Appeals, Seventh Circuit.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

79 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Continental and Commercial Trust and Savings Bank, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States holden at the City of Washington within thirty days from the date hereof, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit, wherein Edward H. Fallows, Trustee, is appellant and Continental and Commercial Trust and Savings Bank, Trustee in Bankruptcy of The Tengwall Company, bankrupt, is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Seaman, one of the Judges of the United States Circuit Court of Appeals this sixth day of November, in the year of our Lord one thousand nine hundred and twelve.

WM. H. SEAMAN, *Judge.*

Due service of the foregoing citation is hereby admitted and receipt of a true copy of said citation is hereby acknowledged this sixth day of November, A. D. 1912.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK,
Trustee in Bankruptcy of The Tengwall Company, Bankrupt.

By HERMAN FRANK &
PERCY B. DAVIS,
Its Attorneys.

80 [Endorsed:] No. 1811. In the United States Court of Appeals, Seventh Circuit. In the Matter of The Tengwall Company, Bankrupt, Edward H. Fallows, Trustee, Appellant, vs. Continental & Commercial Trust & Savings Bank, Trustee in Bankruptcy, etc., Appellee. Citation and proof of Service. Filed Nov. 6, 1912. Edward M. Holloway, Clerk.

81 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1910.

No. 1811.

In the Matter of THE TENGWALL COMPANY, Bankrupt.

EDWARD H. FALLOWS, Trustee, Appellant,
vs.
CONTINENTAL AND COMMERCIAL TRUST & SAVINGS BANK, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, Appellee.

In the Matter of the Appeal of EDWARD H. FALLOWS, Trustee, to the Supreme Court of the United States.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that for the purpose of a hearing of the appeal of Edward H. Fallows, Trustee, appellant in the above entitled cause in the Supreme Court of the United States, the following papers shall be considered to be the record sufficient in all respects for the consideration of the questions to be reviewed by the said Supreme Court on said appeal, and that said papers shall be incorporated into the transcript of the record on said appeal:

1. All papers set forth in the printed transcript of record filed in the United States Circuit Court of Appeals for the Seventh Circuit, in Case Number 1811, Ocober Term, A. D. 1910.

82 2. All the papers constituting a true and complete transcript of the record in said Case No. 1811 in the said United States Circuit Court of Appeals for the Seventh Circuit.

EDWARD H. FALLOWS,
Trustee, Appellant,
By EDWARD J. BRUNDAGE, (O. K.)
EDWIN H. CASSELS, AND
FRANCIS ADAMS, JR., (Not a member),
Counsel for Appellant.
CONTINENTAL AND COMMERCIAL
TRUST AND SAVINGS BANK,
Trustee in Bankruptcy of The Tengwall
Company, Bankrupt, Appellee,
By HERMAN FRANK AND (O. K.)
PERCY B. DAVIS, (Not a member.)
Counsel for Appellee.

83 [Endorsed:] No. 1811. In the U. S. Circuit Court of Appeals, 7th Circuit. In the Matter of Tengwall Co., Bankrupt. Edward H. Fallows, Trustee, Appellant, vs. Continental and Commercial Trust & Savings Bank, Trustee in Bankruptcy, etc., Appellee. In the Matter of the Appeal of Edward H. Fallows, Trustee, to the Supreme Court of the United States. Stipulation.

84 In the Supreme Court of the United States.

EDWARD H. FALLOWS, Trustee, Appellant,
vs.
CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, Trustee in Bankruptcy of The Tengwall Company, Bankrupt, Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable the Clerk of the United States Supreme Court:

You are hereby requested to print the entire record filed with you in the above entitled cause, excepting therefrom the following portion of the record of the proceeding in the United States Circuit Court of Appeals:

1. Appeal bond found on pages 18 and 19.
2. Notice found on pages 20 and 21.

It is stipulated and agreed by and between the parties hereto that such printed record will contain all the portion of the record which is necessary to a determination of the questions involved in this appeal.

EDWIN H. CASSELS, (O. K.)
EDWARD J. BRUNDAGE, (O. K.)
Counsel for Appellant.
HERMAN FRANK, (O. K.)
PERCY B. DAVIS, (Not a member,)
Counsel for Appellee.

85 [Endorsed:] In the Supreme Court of the United States. Edward H. Fallows, Trustee Appellant, vs. Continental and Commercial Trust and Savings Bank, Trustee in Bankruptcy, etc., Appellee. Stipulation. Brundage, Wilkerson & Cassels, Attorneys at Law, 1145 Rookery Building, Chicago.

86 [Endorsed:] File No. 23,440. Supreme Court U. S., October Term, 1912. Term No. 865. Edward H. Fallows, Trustee, Appellant, vs. Continental and Commercial Trust and Savings Bank, Trustee, etc. Stipulation as to printing record. Filed December 2, 1912.

Endorsed on cover: File No. 23,440. U. S. Circuit Court Appeals, 7th Circuit. Term No. 386. Edward H. Fallows, trustee, appellant, vs. Continental and Commercial Trust and Savings Bank, trustee in bankruptcy of The Tengwall Company, bankrupt. Filed December 2d, 1912. File No. 23,440.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

No. 69

EDWARD H. FALLOWS, TRUSTEE, APPELLANT,

vs.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, TRUSTEE IN BANKRUPTCY OF THE TENG-WALL COMPANY, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANT.

EDWIN H. CASSELS,
Counsel for Appellant.

Alphabetical List of Authorities Cited.

STATUTES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

No. 386

EDWARD H. FALLOWS, TRUSTEE, APPELLANT,

vs.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, TRUSTEE IN BANKRUPTCY OF THE TENGWALL COMPANY, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE.

This is an appeal from the judgment or decree of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, disallowing as a secured claim against the estate of the Tengwall

Company, bankrupt, the claim of appellant, Edward H. Fallows, Trustee, for $20,000.

The Tengwall Company was a corporation organized and existing under the laws of the State of Maine, but having its principal place of business at Chicago, Illinois.

On October 7, 1905, The Tengwall Company purchased the plant and equipment of The Tengwall File and Ledger Company of New York, and as a part of the purchase price it made, executed and delivered to Edward H. Fallows, Trustee, appellant, its two hundred (200) bonds, each for the sum of One Hundred ($100) Dollars, and payable fifteen (15) years after date. To secure the payment of these bonds, appellee made, executed and delivered to appellant a trust deed in and by which it conveyed to appellant as trustee, as and for security for the payment of the bonds, all its franchises, rights, licenses and privileges, fixtures, implements, goods, wares and merchandise and all its other property, and such property and machinery as might be added or substituted thereafter, and all new property and machinery acquired, added or substituted thereafter.

Appellee covenanted that it would "suffer no lien which shall have priority to this mortgage to be created, or placed upon the property conveyed or mortgaged hereby, or any part thereof," and that it would do all things necessary to keep valid the lien of the mortgage. This trust deed was duly recorded in the office of the recorder of Cook County on November 1, 1905. (Printed Rec., 6, 21-25.)

On October 5, 1908, an affidavit of renewal was

filed, and on October 6, 1909, a second affidavit of renewal was filed. (Printed Rec., 25-26.)

On June 3, 1910, the appellee executed six (6) judgment notes, and on the same day six judgments aggregating more than $25,000 were entered by confession in the Superior Court of Cook County. Executions were issued on these judgments and placed in the hands of the sheriff for service, but no levy ever was made on any of the property of The Tengwall Company. (Printed Rec., 3.)

On June 4, 1910, the day following the entry of the judgments, a petition in involuntary bankruptcy was filed against The Tengwall Company. On the same day the District Court appointed a receiver who took possession of the property and assets of the bankrupt. (Printed Rec., 2.)

On June 17, 1910, The Tengwall Company was adjudicated to be a bankrupt and on August 9th the appellee, Continental and Commercial Trust and Savings Bank, was elected trustee in bankruptcy. Thereafter appellant filed his claim for $20,000 as a secured claim. (Printed Rec., 2.)

On August 18, 1910, appellee filed its petition setting up the entry of the judgments, the issue of executions thereon, and the delivery of the executions to the sheriff; setting up further that by virtue of said executions, liens had been obtained on the property of the bankrupt, and that such liens would be invalid unless preserved by order of court; that it was necessary to preserve the alleged liens in order to avoid certain prior conveyances made by the bankrupt; that while said conveyances might

not be void as against the trustee in bankruptcy, they would be absolutely void as against judgment and execution creditors, and the trustee prayed for an order preserving the rights and liens of said judgments and executions, and that it, as such trustee, be subrogated to all rights thereunder. (Printed Rec., 10-11.)

On August 22, 1910, notice of the filing of the petition having been served on the appellant as trustee under the trust deed, appellant filed his answer to the petition of the appellee. This answer set out in full pages 11, 12, 13 and 14 of the transcript. In this answer appellant set up that the judgments were not entered in good faith; that the executions thereon were not issued and delivered to the sheriff with the intent that they should be executed; that the notes were made and delivered by the bankrupt on the day preceding the day of the date of the filing of the petition in bankruptcy and in contemplation of the filing of that petition, and that it is not the intent of The Tengwall Company, or that of the payees of the six notes that the judgments entered should be enforced by levy of executions upon the property of the bankrupt, but that the judgments were to be used solely for the purpose of attempting to assert a lien against the property of the bankrupt, which would be superior to the rights of appellant under his trust deed; that the notes were made, executed and delivered with full knowledge of appellant's trust deed on the part of each, and all of the payees of the notes; that counsel for the company represented the judgment creditors and that the entry of the judgments was a part of a scheme on the part of the president of the bankrupt company and

its other officers, to attack the lien of appellant; that the making of the notes was a part of a plan to procure the adjudication of The Tengwall Company as a bankrupt and not for the purpose of enforcing the collection of the notes; that the real purpose was wrongfully to attempt to set aside the lien of appellant under this trust deed; that the company had never disputed the validity of the trust deed or of the lien created thereby; that the company had always recognized said trust deed as valid and paid the interest on the bonds, and that the purpose for which it was sought to subrogate appellee to the rights of said pretended judgment creditors was wholly inequitable and fraudulent. (Printed Rec., 11-14.)

When the petition for subrogation and the answer came up for hearing, appellee objected to the sufficiency of the answer. The referee sustained the objections and the answer was adjudged to be insufficient and it was ordered that the motion of appellee for subrogation be allowed, and that the liens of the judgments be preserved for the benefit of the bankrupt's estate. (Printed Rec., 14-15.) Thereafter the appellee filed its objections to the secured claim of the appellant. (Printed Rec., 15-19.) There were several objections but the ones on which appellee relied were that the statute of Illinois governing the subject of chattel mortgages did not permit more than one renewal, and that even if the statute did permit more than one renewal, the second renewal was one day too late, having been made on October 6, 1909, instead of on or before October 5, 1909, as it should have been made, and that while the lien of appellant's trust deed was good as against

the bankrupt and ordinary contract creditors, it was not good as against the liens obtained by virtue of the judgments. It was also objected but not argued strenuously that the trust deed was void in so far as it covered after-acquired property. On the hearing the referee found the lien of the mortgage was invalid as against the judgment creditors and ordered that claim be disallowed as a secured claim.

Petition for review of the referee's order was then filed. The referee sent up his certificate with findings (Printed Rec., 2-6), and on the hearing the petition of appellant was denied and the report of the referee was approved by the District Court. From this order an appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit and there the judgment of the District Court was affirmed. Appellant then perfected his appeal to this court.

ERRORS RELIED ON.

1. The Court of Appeals erred in holding that the judgment creditors had any liens or rights under their judgments which were in any way superior to, or which took precedence over the lien of appellant's trust deed.

2. Even if it were not error to hold that said judgments created liens against the property of the bankrupt, the Court of Appeals erred in affirming the judgment of the District Court, approving the order of the referee in bankruptcy, subrogating the appellee to such liens.

3. The Court of Appeals erred in holding that the mortgage of appellant was not a valid and subsisting lien, according to its tenor, on all the property of the bankrupt. (Printed Rec., 53-54.)

BRIEF OF ARGUMENT.

This is a controversy solely to determine the priority of two alleged liens on the assets of the bankrupt. Appellant claims a first lien by virtue of his trust deed. Appellee bases its claim on the alleged liens obtained by six judgment creditors on the day before the institution of the proceedings in bankruptcy, which said alleged liens were preserved by an order of the referee for the benefit of the bankrupt's state.

It will not be argued that the lien of appellant's trust deed was invalid as against the bankrupt, and as against ordinary contract creditors, and had it not been for the entry of the order preserving the lien of the judgment creditors, and subrogating the appellee to all rights thereunder, this controversy would not have arisen.

Union Trust Company v. *Trumbull*, 137 Ill., 146.

Allcock v. *Log*, 100 Ill. App., 573.

Stewart v. *Platt*, 101 U. S., 731.

The Illinois Statute on this subject is and was as follows:

> "No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer *to be executed;* and for the better manifestation of the time, the sheriff or other officer shall, on receipt of such writ, indorse upon back thereof the day of the month and year and hour when he received the same."

Illinois Statutes Annotated, 1913, par. 6755, p. 3687.

There is no other statutory provision in Illinois which would in any way operate to create a lien, such as is claimed by the appellee. In order that a lien on personal property may be created by means of an execution, it must be delivered to the sheriff *to be executed.*

No liens on the property of the bankrupt were created by the judgments.

All statutes which create liens must be strictly construed and anything less than the delivery of an execution to the sheriff for the purpose of demand and levy cannot operate to create a lien in favor of a judgment creditor.

Gilmore v. *Davis*, 84 Ill., 487.
Western Union Cold Storage Co. v. *Davis*, 64 Ill. App., 452.
Hawes v. *Cameron* (U. S. C. C. Illinois), 23 Fed., 327.
Smith v. *Irwin*, 77 N. Y., 466.
Doyle v. *Herod*, 9 Colo. Appeals, 257.
Williams v. *Mellor*, 12 Colo., 1.

It will be remembered that the answer of appellant to appellee's petition for subrogation sets up the fact that the executions on the judgments were not delivered to the sheriff for the purpose of executing the same by making a levy on the property, and that the notes upon which the judgments were entered were made with full knowledge on the part of the judgment creditors of appellant's trust deed, and that in fact the judgments were entered and executions issued and delivered to the sheriff, not for the purpose of securing the payment of the

judgments, but solely for the purpose of attempting to have declared invalid the lien which appellant had under his trust deed. The referee's findings were in accordance with the allegations of the answer, namely: that the executions were issued and placed in the hands of the sheriff "for service" and that they remained in the hands of the sheriff until August 31, 1910. The referee further certified that "the answer of said Fallows (appellant) was found to be insufficient," and the prayer of the petition for subrogation was allowed. The record further shows that no levy was, in fact, made or attempted, the reason for this being that on the very next day after the entry of the judgments, the petition in bankruptcy was filed. (Printed Rec., 2.)

Clearly the validity of the liens claimed by the judgment creditors must be decided by the law of the State of Illinois.

> *Rock Island Plow Co.* v. *Reardon*, 222 U. S., 354.

Under the statute of the State of Illinois the word "service," as applied to an execution, means no more than handing a copy of the same to the judgment debtor, and making a demand for the amount of the judgment. This is clearly shown by the provisions of the Illinois statute governing the fees of sheriffs. The statute regarding sheriff's fees, expressly provides fees as follows:

> "For *serving* a writ of attachment on each defendant, one dollar. * * *
>
> For *serving* notice of execution and copy, one dollar and twenty-five cents.

For *levying* an execution or a writ of attachment, two dollars."

Illinois Statutes, Annotated, 1913, par. 5662, p. 3079.

The Illinois statutes further provide:

"The person in whose favor execution is issued, may elect on what property not exempt from execution he will have the same levied, provided personal property shall be last taken."

Illinois Statutes, Annotated, 1913, par. 6757, p. 3694.

And it is further provided that no execution shall bind the goods and chattels of the person against whom it is issued until it is delivered to the sheriff, or proper officer, "to be executed."

Illinois Statutes, Annotated, 191, par. 6755, p. 3687. (Set out in full *supra*.)

It is very clear from the sections of the statute which we have quoted that the word "serving" and the word "levying" mean entirely distinct and different things. The words "serving" means personal delivery of a copy of the execution to the debtor and making a demand. Execution means both service and levy. In the case of an individual debtor, who has a right to exemptions, the statute, by express terms, makes such a demand necessary; and in the case of a corporatoon debtor the serving of such notice and the making of a demand is necessary because a corporation has a right to have its personal property last taken in satisfaction of the execution. Moreover, under the decisions of the Supreme Court of Illinois, under the statutes, it is the duty of the

sheriff receiving an execution, to serve notice of the same and make a demand upon the execution debtor *before making a levy.*

Cook v. *Scott*, 1 Gilman, 333.
Bingham v. *Maxey*, 15 Ill., 290.
Pitts v. *Magie and Leiter*, 24 Ill., 610.
Hamilton v. *Quimby*, 46 Ill., 90.
Wright v. *Deyoe*, 86 Ill., 490.
Davis v. *Chicago Dock Co.*, 129 Ill., 180.
Miller v. *McAlister*, 197 Ill., 72.
Boggess v. *Pennell*, 46 Ill. App., 153.
Misener v. *Glassbrenner*, 221 Ill., 384.

In the case last cited, the court said, at page 388:

"It is the duty of the officer holding the execution to notify the defendant thereof before proceeding to levy the same when that was practicable."

In *Miller* v. *McAlister*, 197 Ill., 72, the court said, at page 84:

"In *Pitts* v. *Magie*, 24 Ill., 610, we said: 'Indeed, it is the first duty of an officer having an execution against a party, to apply to him personally for payment whenever that is practicable, and the officer, should be held responsible to the party aggrieved, for a neglect of this duty, wherever special damages result from it.'"

In *Davis* v. *Chicago Dock Co.*, 129 Ill., 180, the court said, at page 191:

"It is the duty of the sheriff to notify the defendant in execution before making the levy and to apply to it for payment of his execution."

The effect of the use of the words "serving" and "levying" in the statute which we have quoted is clearly set forth in the opinion in the case of *Bog-*

gess v. *Pennell*, 46 Ill. App., 150. In that case, notice of the execution was given to the defendant by means of a letter in which it was stated that the law compelled the sheriff to make a demand for the amount, but no demand was specifically made. The question was whether or not this was a sufficient demand and the court said, at page 156:

> "It is urged, however, that the law intends the officer shall personally demand payment of the execution, and that this is the notice the law requires. In general, where notice is required by statute or by rule of court, and the method of serving the same is not laid down, it is understood there shall be personal service. Wade on Notice, Sec. 1334; *C. & A. R. R. Co.* v. *Smith*, 78 Ill., 96. By Par. 19, Chap. 53, relating to fees and salaries, the sheriff is authorized to charge 'for service of notice of execution * * * seventy-five cents and mileage five cents each way.' *Here there seems to be a distinct legislative recognition of the proper mode of giving notice of the execution.* We believe that it has been the uniform practice to serve notice in this personal way before making a levy, whenever it is practicable to do so. Of course, if the debtor is not in the county, or conceals himself, or avoids the officer, a different question would be presented. Here the defendant lived a few miles from the county seat, and there was no difficulty in personal service. That such personal *service* is essential whenever practicable, has been clearly held or recognized by the Supreme Court in *Pitts* v. *Magie*, 24 Ill., 613; *Rock* v. *Haas*, 110 Ill., 528; *Finlen* v. *Howard*, 126 Ill., 291; *Davis* v. *Chi. D. D. Co.*, 129 Ill., 191."

The finding of the referee, therefore, that executions were placed in the hands of the sheriff for service, is, in fact, a finding that the allegations in

the answer of appellant to the petition of appellee for subrogation, were true, and the executions were placed in the sheriff's hands for serving notice, and making the accompanying demand as required by law, and only that. The appellee is claiming under the specific provisions of Par. 6755 of the Illinois Statute, Annotated, and the burden was upon the appellee to show that it had complied with the statute. In other words, it was necessary for the appellee to show affirmatively that the executions were placed in the hands of the sheriff "to be executed," as required by statute. The word "executed" as used in the statute means not only that the execution must be served but that a *levy* must be made. An execution in the hands of the sheriff for service only creates no lien. It must be in the hands of the sheriff for levy. This was the holding of the Circuit Court of Appeals of the Seventh Circuit in *Reardon* v. *Rock Island Plow Co.*, 168 Fed., 654, where this same statute was under consideration and where the court said:

> "The executions described in the bill were issued in favor of judgment creditors of the bankrupt and in the hands of the sheriff *for levy.*"

And this Court, in considering the same question on appeal, lays down the same rule that an execution must be held by the sheriff "for levy" in order to operate to create a lien upon the personal property of the judgment creditor.

In *Rock Island Plow Co.* v. *Reardon*, 222 U. S., 354, this Court, in discussing the question as to whether or not certain judgments upon which executions had been issued for levy, created a lien on

personal property good as against conditional sale purchasers, said:

> "As the executions issued upon the judgments, which executions issued were held by the sheriffs *for levy*, operated to create liens upon the property in question, then in the possession of Brown, although held under conditional-sale contracts. * * *"

The courts often have construed the word "executed" with reference to executions and have decided that it means to obey the command of the writ. There must be a levy or a seizure of the property of the defendant, and if the execution is not placed in the hands of the officer for the purpose of making a levy, it is not placed in his hands "to be executed."

In *Andrews* v. *Keep*, 38 Ala., 315, it was held that a failure to make the money on a *fi fa*, when by *due* diligence it might be made, is a "failure to execute process," under the provisions of the Code of Alabama. The court said, at p. 317:

> "To 'execute process' is to perform its mandate. The mandate of a *fieri facias* is, that of the property of the defendant the sheriff cause to be made a specified sum of money; and if the sheriff has failed to do this, he has failed to execute the *fi fa*. Hence, we conclude, that a failure to make the money on an execution is a failure to execute process."

In *Waterman* v. *Merrill*, 4 Vroom, 378, the court said, at page 381:

> "This motion, then, must stand, if it can stand at all, on the first ground alleged, viz.: that the sheriff has neglected or refused to execute the writ (execution). To execute the writ, in the sense of the act, is to do all that the writ commands to be done."

See, also, to the same effect:

Kemble v. *Harris*, 36 N. J. L., 526.
State v. *Hamilton*, 16 N. J. L., 153.
Harris v. *Rankin*, 4 Manitoba, 115.
Wood v. *Lowden*, 117 Cal., 232.

In *Cheston* v. *Gibbs*, 13 L. J. Exch., 53, it was held that the words "executed and levied" were synonymous and signified a seizure in execution.

Lord Abinger, C. B., said, at page 55:

> "I should say that the words 'executed or levied' mean the same thing, and that they signify a seizure."

It will be argued that the word "service" means every proceeding necessary to be taken by the sheriff to collect the amount of the execution and the Court of Appeals in substance so held, citing in support of its holding, *Peck* v. *City National Bank*, 51 Mich., 353. (Printed Rec., 50.)

This case construes the law of Michigan, providing for sheriff's fees. There is a statement or dictum in the opinion that the word "service" of an execution includes every act and proceeding to be taken by the sheriff to make the money, and includes the sale of the property when necessary, citing 1 Caines, 194. In so far as this dictum of the Michigan court is based upon the case in 1 Caines, it is erroneous.

The case referred to is *Hildreth* v. *Ellice*, 1 Caines, 192. In that case it was held that if a sheriff levy on lands he will be entitled to his full poundage on the sum indorsed though in consequence of an amicable settlement, he do not sell.

The Michigan case, citing and relying on the case in 1 Caines, held just the opposite. In the case in 1 Caines, it appears that there was a dissenting opinion by Judge Livingston, in which he stated that "service is not complete until an actual sale of the property." It is upon this statement in the dissenting opinion that the Michigan court bases the dictum relied upon by appellee. The Michigan court must have mistaken the dissenting opinion as the opinion of the case; and if the dictum of the Michigan court rests only, as it apparently does, on the authority of the New York case in 1 Caines, it is based on the dissenting opinion, which was not the law of that case.

But aside from the erroneous authority on which it was based, under no circumstances can the Michigan case properly be considered as an authority in Illinois, nor can its definition of the word "service" stand in view of the provisions of the Illinois statute, for the reason that the statute which was construed in the Michigan case did not make any special provision for fees for *levying* an execution, as does the statute of Illinois. The Michigan statute provides fees for the sheriff as follows:

> "For *serving* an attachment for the payment of money, or an *execution* for the payment of money, or a warrant issued for the same purpose, and delivered to him by the county treasurer, or any supervisor, for collecting the sum of two hundred and fifty dollars or less, two and one-half per cent., and for any sum more than two hundred and fifty dollars, one and one-quarter per cent.; advertising goods or chattels, lands or tenements for sale, on any execution, if a sale be made, one dollar; and if the execu-

tion be stayed, or settled, after advertising and before sale, fifty cents."

Public Acts of Michigan, 1881, p. 103.

If we concede that it might properly be held under such a statute (Michigan) that the word "serving," as there used, is intended to mean more than mere service—giving notice of the writ by leaving copy—its usual meaning—still under the statute of Illinois, no such meaning can possibly be given to the word "serving."

Under well recognized rules of statutory construction, every word used in a statute has a distinct and definite meaning, and where different words are "Serving" means one thing, and "levying" means different things. If the word "serving," as used in the Illinois Statute, was intended to include a levy, the word "levying" would not have been used. Each word means a definite and distinct act of the sheriff. "Serving" means one thing, and "levying" mean an entirely distinct and different thing; and serving does not include "levying" (levy) as was clearly set forth in the opinion in the case of *Boggess* v. *Pennell, supra.*

"Service," therefore, under the Illinois Statute, has its usual meaning. "Served" does not mean "executed." Delivering a writ for service does not mean delivery "to be executed." An execution cannot be "executed" unless a levy actually is made. The record in this case fails to show that a levy was made, and, on the other hand, it clearly shows that the executions were *not* delivered to the sheriff for the purpose of levy, but for the purpose of serv-

ice *only*. Not having been delivered to the sheriff, therefore, "to be executed" by the making of a levy, no lien whatsoever attached.

The Referee abused the discretion lodged in him by the statute in entering the order preserving the alleged liens of the judgment and in subrogating the trustee in bankruptcy to all rights thereunder, even though it be conceded that the entry of the judgment and delivery of the executions to the sheriff did create liens.

Section 67-f of the Bankruptcy Act of 1898 provides as follows:

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void * * * unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien, shall be preserved for the benefit of the estate."

Under the terms of the Act, it is clear that the referee had a discretion which he was obliged to exercise reasonably and in accordance with the rules of equity and good conscience, when the petition of the trustee in bankruptcy, asking for the preservation of the alleged liens of said judgments, was presented.

First National Bank of Baltimore v. *Staake*, 202 U. S., 141.

In that case the property of a bankrupt had been seized under an attachment writ within four months prior to the institution of bankruptcy proceedings. Prior to the attachment, the property had been sold,

but the deed was not executed and recorded until after the attachment had been levied. Acting under the provisions of Section 67-f of the Bankruptcy Act the court preserved the lien of the attachment for the benefit of the bankrupt estate. Mr. Justice Brown in speaking of this order (page 147) said:

> "This is one of the very contingencies provided for by the second clause of the section which apparently vests in the court a certain *discretion* with regard to the preservation of right acquired under the attachment or other lien."

And it is important to bear in mind that the court makes special mention of the fact that the vendee, who had notice of the motion for subrogation, made no objection to entry of the order, the court saying that "Shimer," (the trustee in bankruptcy of the vendee) "made no objection, and the court declined to express an opinion as to his rights."

In *Thompson* v. *Fairbanks*, 196 U. S., 516, it appeared that a trustee in bankruptcy had moved under Section 67-f, on notice to a mortgagee, for an order preserving the lien of an attachment which had been levied before the mortgagee took possession of the mortgaged property under his chattel mortgage. The mortgage at the time the controversy arose, covered property nearly all of which had been acquired after the mortgage was executed, and hence the lien of the mortgage, while good against the mortgagor and general creditors, was not good against attachment and judgment creditors whose liens attached before the mortgagee took possession. It appears that the mortgage had been executed on 15 April, 1891. The attachment writ was levied on

7 May, 1900, and the defendant mortgagee took possession under his mortgage on 16 May, 1900, understanding at that time that it was probable that the attachment would hold good as against his mortgage. On 30 June, 1900, the bankrupt filed his voluntary petition in bankruptcy and an order of adjudication afterwards was entered, thus making the attachment void unless preserved by order of court, for the benefit of the estate. The District Court for the District of Vermont denied the motion (*In re Moore*, 107 Fed., 234) and the Supreme Court, in commenting upon this said (page 527):

> "The trustee moved under Par. 67-f (30 Stat. at L., 565, Chap. 541, U. S. Comp. Stat. 1901, p. 3450), on notice to the defendant, for an order that the right or lien under the Ryan attachment should be preserved, so that the same might pass to the trustee for the benefit of the estate, as provided for in that section. This was denied. And unless such permission had been granted, the lien of the attachment was not preserved by the act, but on the contrary it was dissolved under Par. 67-e."

When this matter of subrogation (the same referred to in *Thompson* v. *Fairbanks*, *supra*) came before the District Court in *In re Moore*, 107 Fed., 234, on motion of the trustee in bankruptcy for an order preserving the lien of the attachment, the District Court in refusing the order of subrogation said, at p. 235:

> "*The spirit of the bankruptcy act does not lead to the destruction of lawful liens, and its provisions shall not be used to displace one by another for the purpose of defeating it without good cause.* Under the circumstances, it is thought to be most proper and just that these

liens be left to stand or fall upon their respective merits in their several places."

5 Cyc., 367 (Note) comments on this section of the Bankruptcy Act as follows:

"The spirit of the Act does not lead to the destruction of lawful liens and its provisions should not be used to displace one lien by another for the purpose of defeating the former without good cause, and where a trustee seeks to preserve a voidable attachment for the purpose of defeating a prior chattel mortgage, the petition will be dismissed and the liens left to stand upon their own merits."

In re Sentenne & Green Company, 9 A. B. R., 648, there was a controversy to determine priority between the lien of certain attachments and the lien of a mortgagee on after acquired property. On application, the trustee had been subrogated to the rights of the creditors who had levied the attachments. The court held that the order of subrogation was *inequitable* as against the mortgagee as to the after-acquired property and modified the order of the court below.

On page 561 the court said:

"But it is conceded that *In re New York Economical Printing Co.*, 6 Am. B. R., 615, * * * the Circuit Court of Appeals of this circuit determined that a trustee was not permitted to attack the mortgage unless he represented a creditor armed with process; but the trustee urges that he is thus enabled by the fact that he has been subrogated by the order of this court to the rights of the creditors who levied attachments upon the after-acquired property *even before there was any attempt to foreclose the mortgage*. If the order of subrogation be al-

lowed to stand, the trustee's position seems to be correct. * * *

Equitably the mortgagee is entitled to such property and so far as the attachments and the subrogation of the trustees interrupt such equity, the order will be modified by the court."

1 Remington on Bankruptcy, 1489, has this comment:

"Subrogation to nullified attachment liens, which under state law would have cut off chattel mortgagee's rights to after-acquired property, has been both granted and refused on grounds of equity.

Likewise, the preservation of other attachment liens, which would have cut off intervening rights has been granted or refused as the court has deemed equitable.

Likewise subrogation to the nullified liens of creditors' bills has been sometimes granted and at other times refused as the court has deemed equitable."

And Jones on Chattel Mortgages, Fifth Edition, Par. 138 (a) states:

"The right of an attaching creditor who has levied on future acquired property before the mortgagee obtains possession does not pass by subrogation to a trustee in bankruptcy, in case the mortgagor becomes bankrupt, in spite of the provision in the Bankruptcy Act that the trustee is subrogated to all liens of creditors. In equity the mortgagee is entitled to after-acquired property, included in the terms of his mortgage, *and the bankruptcy court which is a court of equity will not defeat this equitable right of the mortgagee by decreeing a right of subrogation in favor of the trustee.*"

Clearly the court under the provisions of 67-f of the Bankruptcy Act has a discretion which it is

bound to exercise when application is made to preserve for the benefit of the estate liens obtained within the four months period. As the courts have said the spirit of the Bankruptcy Act does not lead to the destruction of lawful liens. The provisions of Section 67-f should never be used to displace one lien by another without good cause. What the court is asked to do in cases of this kind is to preserve for the benefit of the estate a lien which is absolutely valueless to its owner, and such a lien ought only to be preserved when the principles of equity and good conscience demand its preservation. All proceedings in bankruptcy are, in their nature, equitable proceedings, and governed by equitable principles and rules, and the discretion of the court in entering orders preserving liens must be exercised equitably, keeping in mind always that the trustee in bankruptcy is the trustee for *all* creditors, both secured and unsecured.

Thus, even if it be conceded in this case that liens did attach under the judgments, they ought never to have been preserved by the court in view of the nature of their origin. The judgments in this case were admittedly collusive judgments, the result of a scheme on the part of the bankrupt and the judgment creditors not to obtain the judgments and to execute them, as provided by law, but simply to obtain them for the avowed and express purpose of acquiring what they deemed would be a basis upon which to contest the validity of appellant's lien. The indebtedness for which the judgment notes were given, was contracted and the notes were executed,

with the knowledge on the part of the creditors (and the bankrupt) that appellant's mortgage was valid and subsisting, and that the debt which it secured was unpaid; that the bankrupt had always recognized its validity and that bankruptcy proceedings were about to be instituted. Having full knowledge of appellant's mortgage, the creditors knew of the provisions in the mortgage to the effect that the bankrupt had covenanted to pay all taxes, assessments and other charges levied upon the mortgaged property, and that it would "suffer no lien which shall have a priority to this mortgage to be created or placed upon the property conveyed or mortgaged hereby, or any part thereof," and that it would "do all acts necessary to be done to keep valid the lien and priority of the mortgage, and the property and franchises conveyed thereby. The creditors and the bankrupt had the same counsel. In the case of one of the judgments, the president of the bankrupt company was also president of the company obtaining the judgment. The creditors knowing then that in executing judgment notes and in permitting judgments to be entered by confession, as they were, on the day before the institution of the bankruptcy proceedings, the bankrupt was making an attempt deliberately to violate a covenant of the mortgage, they virtually became a party to a breach of the covenant, and we submit that it clearly was the duty of the court to refuse to preserve such liens (if any), and the Referee in this case in entering the order, clearly abused the discretion lodged in him by the Bankruptcy Act and the District Court and the Court of Appeals wrongfully and erroneously approved and affirmed the order of the Referee.

Appellant's claim should have been allowed as a secured claim and appellant's mortgage should have been held to be a first lien on the assets of the bankrupt. Appellant's lien should not have been postponed to the alleged liens of the judgments.

If the argument of the appellant thus far is sound, this controversy will be ended, and appellant's lien must be held to be a good and valid first lien on the assets of the bankrupt. What the court below really held was that the liens of judgment creditors should be given priority over the lien of appellant's mortgage. (Printed Rec., 51.) The total amount of these judgments was more than the amount realized at the sale of the mortgaged property, and hence, there was no residuum upon which appellant's lien might attach. Except for the order of subrogation, appellee would have had no basis upon which to contest the first lien of appellant. Having shown, as we believe, that the order of subrogation was wrongfully entered, and that the liens which it sought to preserve did not, in fact, exist, it hardly becomes necessary to argue the question whether or not appellant's mortgage was properly renewed, in accordance with the provisions of the Illinois statute. Inasmuch as this point has been raised in the pleadings and argued below, we again present the matter in the argument before this court.

In the first place, we may say without fear of contradiction, that irrespective of the question of whether or not appellant's mortgage was properly renewed, it was good as a first lien at law on prop-

erty in existence at the time of its execution, and as a good lien in equity on substituted and after-acquired property; good not only against the bankrupt and appellee, as its trustee in bankruptcy, but good as against all creditors who had not obtained valid liens by legal or equitable proceedings or by valid conveyance. For it is well settled that a mortgage good as between the mortgagor and the mortgagee is good also against general creditors.

In *Union Trust Company* v. *Trumbull*, 137 Ill., 146, the court said in discussing this question, at p. 180:

> "There is no mode under our law, except by chattel mortgage duly acknowledged and recorded, by which the owners of personal property retaining its possession, can give another a lien upon it that can be enforced as against creditors and subsequent purchasers. But by 'creditors' is meant, not general creditors or creditors at large, and only such creditors as are armed with an execution or writ of attachment, or other process of court, are regarded as creditors 'in the sense that they are authorized to impeach a conveyance or transfer of property by their debtors for fraud or question the validity of an equitable lien or personal property that is good as against such debtors themselves, and their heirs, executors, administrators and voluntary assignees.'"

See also:

Hammon on Chattel Mortgages in Illinois, p. 50.

Borden v. *Croak*, 131 Ill., 68.

Allcock v. *Foy*, 100 Ill. App., 573.

In re Antigo Screen Co., 123 Fed., 249.

Stewart v. *Platt*, 101 U. S., 731.

The objection to the validity of the lien of appellant based upon the fact that appellant's mortgage covers substituted and after-acquired property, is not important. A mortgage in Illinois on after-acquired property creates an equitable lien good as against the mortgagor and all his creditors who have not obtained liens by equitable proceedings.

In discussing this subject the Supreme Court of Illinois said in *Borden* v. *Croak*, 131 Ill., 68, 75:

> "A different rule, however, prevails in equity. There, while such mortgage itself does not pass the title to such property, it creates in the mortgagee an equitable interest in it, which will prevail, even against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The ground of the doctrine is, that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being regarded as a trustee for him, in accordance with the familiar maxim that equity considers that as done which ought to be done. Id., sec. 170."

In *Morganstein* v. *Commercial National Bank*, 125 Ill. App., 397, the court said:

> "A party can create a lien on after acquired property in this state. * * * What the mortgagee acquires by such mortgage of after acquired property is an equitable lien or charge upon the property."

It will be remembered that appellant's mortgage was duly filed on 1 November, 1905. The first affidavit of renewal was filed 5 October, 1908; both filings were admittedly in compliance with the stat-

ute. The second affidavit of renewal was filed 6 October, 1909. The judgments were rendered and executions placed in the hands of the sheriff on 3 June, 1910.

It was contended by the appellee that the Illinois Chattel Mortgage Act allows but one affidavit of renewal, which operates to extend the lien of the mortgage for one year only; and, hence, the second affidavit of renewal was ineffective to extend the lien of appellant's mortgage as against judgment creditors and other intervening lienors.

It was further contended by the appellee that even if the Chattel Mortgage Act of Illinois allowed more than one renewal, nevertheless, the second renewal was not filed in time, being, in fact, filed one day too late; it being argued that the first affidavit being filed on 5 October, 1908, was effective only to extend the lien of the mortgage to 5 October, 1909, and that even if a second affidavit could have been filed, it should have been filed within thirty days before 5 October, 1909.

Section 4 of the Illinois Mortgage Act being "An Act to revise the Law in relation to Mortgages on Real and Personal Property"; approved 26 March, 1874, as amended in 1887 and 1891, is as follows:

> "Such mortgage, trust deed or other conveyance of personal property acknowledged, as provided in this act, shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded, or in case the mortgagor is not a resident of this state, then in the county where the property is situated, and kept, and shall thereupon, if *bona fide*, be good

and valid from the time it is filed for record until the maturity of the entire debt or obligation, or extension thereof made so hereinafter specified; *provided*, such time shall not exceed three years from the filing of the mortgage unless within thirty days next preceding the expiration of such three years, or if the debt or obligation matures within such three years, then within thirty days next preceding the maturity of said debt or obligation the mortgagor and mortgagee, his or their agent or attorney, shall file for record in the office of the recorder of deeds of the county where the original mortgage is recorded, also with the justice of the peace, or his successor, upon whose docket the same was entered, an affidavit setting forth particularly the interest which the mortgagee has by virtue of such mortgage in the property therein mentioned, and if such mortgage is for the payment of money, the amount remaining unpaid thereon, and the time when the same will become due by extension, or otherwise; which affidavit shall be recorded by such recorder and be entered upon the docket of said justice of the peace, and thereupon the mortgage lien originally acquired, shall be continued and extended for and during the term of one year from the filing of such affidavit, or until the maturity of the indebtedness or extension thereof secured by said mortgage; *provided*, such time shall not exceed one year from the date of filing such affidavit."

Illinois Statutes, Annotated, 1913, Par. 7579, p. 4296.

The objections of the appellee are based particularly upon that portion of Section 4 relating to the renewals of chattel mortgage liens. We also wish to call to the attention of the court the provisions of Section 5 of the same act which are as follows:

"A copy of any such mortgage or other in-

strument, acknowledged, filed and recorded as aforesaid, including any *affidavits* annexed thereto, in pursuance of this chapter, certified by the proper recorder, from the records thereof, and also any copies of such *affidavits* filed with the justice of the peace before such mortgage or other instrument was acknowledged, or his successor in office, in pursuance of this chapter, may be read in evidence in like cases, and upon the same conditions as copies of deeds and conveyances of lands so certified."

Illinois Statutes, Annotated, 1913, Par. 7580, p. 4298.

We contend that under the terms of Section 4 more than one affidavit of renewal of a chattel mortgage may be filed. It is true that the Act does not in express terms authorize an annual refiling after the first year, but there are no provisions in the Act which state that such filings may not be made, and it is significant to note that in that part of Section 5, which refers to the renewal affidavit, the word is used in the plural, while in section 4 the singular only is used. If the statute contemplated that only one affidavit could be filed, the use of the word "affidavits" in Section 5 would be meaningless.

The first Illinois Chattel Mortgage Act (1845) provided that a chattel mortgage, if recorded, was valid for a period of two years *only*, and the Illinois Supreme Court in construing that act, held that the mortgage was valid for a period of two years, even if the debt matured after two years. But the Act of 1845 had no provision whatsoever for the renewal of a chattel mortgage. The Chattel Mortgage Act of 1887 did not authorize the making of a valid chat-

tel mortgage to secure a debt due after the expiration of two years. The amendment of 1891 (by the provisions of which appellant's mortgage is governed), removed this restriction so that now a valid chattel mortgage may be made to secure a debt due after the expiartion of three years, or after the expiration of three years and a renewal period of one year, that is to say: after the expiration of four years.

Keller v. *Robinson*, 153 Ill., 458.

The debt in the case at bar became due fifteen years after the date of the bonds and mortgage. Notwithstanding this fact, the lien of the mortgage admittedly could be made valid for four years, and appellant contends that it may be kept valid by successive renewals in accordance with the statute, until the maturity of the debt.

It being established under the law, as it now stands (and as it stood at the time of the execution of the trust deed in this case) that there is no limitation placed upon the maturity of the debt, and that renewal of a chattel mortgage is permitted, it should follow, unless there are express words in the statute to the contrary, that the renewals provided for in Section 4 and mentioned in Section 5, may be made successively one after another until the maturity of the debt, thus keeping alive the security which is an incident of the debt until the maturity of the debt.

If Section 4 is not construed to mean that more than one renewal may be filed, then one of the objects of the section, as it now stands, is defeated,

because the charge in this section was made (as an Illinois court has said) "for the purpose of permitting *extensions* of such mortgages without impairing the lien, or requiring new instruments, and without danger of letting in other liens," and to remove a situation which would otherwise become intolerable, whereby the debtor who had been given a chattel mortgage and was unabile to pay the debt at maturity, was subjected to greater embarrassments and burden than any other debtor who had given security.

Fuller v. *Smith*, 71 Ill. App., 576.

In its opinion in this case, in referring to Section 4 of the Illinois Mortgage Statute set out in full, *supra*, the court said, at page 580:

> "Before the adoption of the statute above recited, a debtor who had been given a chattel mortgage and was unable to pay the debt at maturity was subject to greater embarrassments and burdens than any other debtor who had given security. Any other debt could be extended by an agreement between the parties without the impairment of the security, but when a chattel mortgage came due the debt must be paid or the creditor must seize the property or lose his lien. If an *extension* was mutually agreeable to the parties, it could not be effected except by giving a new mortgage at the risk of letting in intervening liens. The law as it then stood was calculated to force foreclosures of chattel mortgages. The change in question was made for the purpose of permitting *extensions* of such mortgages without impairing the lien or requiring new instruments, and without danger of letting in later liens."

While it is true that a statute in regard to chat-

tel mortgages is in derogation of the common law and should be strictly construed this rule applies especially to the statutory provisions in relation to the *creation* of the chattel mortgage lien. *The provision of the statute with reference to the renewal or extension of a lien, after it once has attached to the personal property is to be liberally construed.*

Cox v. *Stern*, 170 Ill., 452.
Hamilton v. *Seegar*, 75 Ill. App., 599.
Fuller v. *Smith*, 71 Ill. App., 576.

But it is contended by the trustee that even if successive renewals may be filed, the second renewal in this case was not filed in time. We submit that that provision of Section 4, which states that "the mortgage lien originally acquired shall be continued and extended for and during the term of one year, from the filing of such affidavit," is to be interpreted in connection with the rest of the section as meaning one year from the period of the filing of such affidavit, that is to say: one year from the day of the date when such affidavit might have been filed under the provisions of Section 4. This period is a thirty-day period. If the section is construed to mean from the day of the date, then naturally it puts a premium on delay and procrastination. If it means from the period of filing, then the second affidavit in this case was filed in time, since the first affidavit might have been filed as late as November, 1908, the last day of thirty-day period.

But there is another point which must be considered in connection with this point. Even if the words "from the filing of such affidavit," as

they appear in Section 4, be construed as meaning from the day of the date of the filing as contended by the appellee, nevertheless, if it be held that the statute permits successive filing, the appellee in this case, relying on the judgment liens, ought not to be permitted to question the validity of the mortgage lien for the reason that the liens to the rights of which the trustee in bankruptcy has been subrogated, did not attach between 5 and 6 October, 1909, that is to say: within one year after the day of the date of the filing of the first affidavit of renewal and before the filing of the second affidavit. The first affidavit was filed on 5 October, 1908. The second affidavit was filed on 6 October, 1909, but the judgments were not rendered and executions placed in the hands of the sheriff until 3 June, 1910; or during the life of the second affidavit, and hence the liens of the judgments (if any) attached while the mortgage was in full force and effect as against such liens, and the mortgage should be held to have priority.

Swift v. *Hart*, 12 Barb., 530.
Newell v. *Warner*, 44 Barb., 258.
Nixon v. *Stanley*, 33 Hun., 247.
Baker v. *Becker*, 67 Kas., 831.
Riederer v. *Pfaff*, 61 Fed., 872.

Swift v. *Hart* was replevin instituted by the assignee of a mortgagee named in a chattel mortgage against the sheriff for taking certain property covered by the chattel mortgage under executions issued in favor of judgment creditors of the mortgagor. The chattel mortgage was dated 17 Septem-

ber, 1846, and filed 18 September, 1846. In February, 1848, it was refiled with a statement of the plaintiff's interest. On 7 April, 1848, executions were issued and a levy made by the defendant. The court said at page 533:

> "The question arises whether the refiling of the mortgage, after the expiration of the year from the first filing, is effectual to protect the mortgagee and his assigns as against an execution creditor, whose execution is not levied until after the second filing, but is levied within a year from and after that time. * * * The statute on the subject is as follows: 'Every mortgage filed in pursuance of this act, shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof; unless within thirty days next preceding the expiration of the said term of one year, a true copy of said mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register aforesaid, of the town or city where the mortgagor shall then reside.' (Sess. L. of 1833, Ch. 297, Sec. 3; 2 R. S., 3d Ed., 196, Sec. 11.) * * * although from the expiration of the year, the mortgage becomes dormant and invalid, as against creditors and purchasers, yet upon filing it again, it becomes revived and valid as against such creditors and purchasers, whose liens had not attached during the interval. * * * Upon the whole, I am of the opinion that the second filing of the mortgage in this case may be regarded in the light of an original filing at that time; and in the absence of actual fraud, was good and valid as against subsequent liens."

In *Newell* v. *Warner*, 44 Barb., 258, a chattel mortgage was filed 23 Feb., 1858. Renewal affidavits were filed 17 February, 1859, 30 January, 1860, 12 January, 1861, 8 January, 1862, 9 January, 1863. It was claimed that the chattel mortgage was void as against an execution creditor whose execution was levied 12 January, 1863. The court said at pp. 264-265 and 266:

> "The statute provides that every mortgage filed in pursuance thereof, *shall cease to be valid* as against the creditors of the person making the same, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year a true copy of such mortgage together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him, by virtue thereof, shall again be filed. The time for this filing as the court I think correctly held, relates to the first filing of the mortgage, and is limited to a period of thirty days previous to the expiration of the term of one year from such first filing. * * * And I have no doubt that where a mortgage is sought to be kept on foot through a number of years, there must be successive filings annually, of the copies and statements, or the mortgage will cease to be valid as against creditors, and subsequent mortgagees and purchasers in good faith of the mortgagor. This was held in *Nitchie* v. *Townsend*, 2 Sand., 299. The language of the statute may perhaps be satisfied with the filing of one copy only, in such a case, as contended for by the plaintiff's counsel; but its obvious spirit, policy and meaning would not. The plaintiff's counsel contends that any filing of a mortgage or a copy thereof, at any time, is effectual to revive and continue the validity of such mortgage within the year or afterwards, whether

made within the time prescribed by statute or not, within the decision in the case of *Swift* v. *Hart*, 12 Barb., 530.

I do not see but this is so. It is true that that was the case of the original mortgagee refiled after the expiration of the time prescribed by statute. But the statute makes the filing of a copy just as effectual as the filing of the original. And if we are at liberty to depart at all from the provision of the statute, it can make no difference whether the filing is earlier or later than the prescribed time. I dissented from the majority of the court in the case referred to, and am still entirely unable to see how it is that when the statute says in plain terms that unless a certain thing is done within a certain time, the mortgage shall cease to be valid, as against creditors, its validity can be restored or continued by doing the thing at another and different time. I do not propose to argue this question over, but submit to the authority of the decision."

In *Nixon* v. *Stanley*, 33 Hun., 247, the court in discussing this question said:

"It was held by this court in *Swift* v. *Hart*, 12 Barb., 530, that by the omission to refile the mortgage within thirty days preceding the expiration of the year from the time of the first filing, it became dormant and invalid as against creditors and purchasers whose liens had not attached during the interval.

The ruling was made upon the same principle that an execution against personal property which has become dormant by reason of the plaintiff's directing proceedings to be stayed, may afterwards be revived, and receive vitality by being set in motion by the plaintiff, so as to be effectual as against subsequent executions; that it did not violate the spirit or defeat the object of the statute to allow a mortgagee to

revive and resuscitate the lien of his mortgage which had become dormant as respects purchasers and creditors, that the object of the statute was to prevent fraud, and with this view the holder of the mortgage is required to file his mortgage and thus give it publicity.

The interpretation given to the statute in this case has not been overruled or questioned, so far as I can find, after a very careful examination of all the cases. It should be followed as an authority in the case before us as giving a proper exposition of the statute upon the question under consideration.

In the subsequent case of *Newell* v. *Warner*, 44 Barb., 263, a reference was made to *Swift* v. *Hart* by Johnson, J., who said he recognized the same as authority on the precise question determined therein. He was a member of the court when the first of these cases was decided, and dissented from the conclusion reached by a majority of the court.

The evidence tended to prove that the mortgage was given for a good consideration and to secure an honest indebtedness and without any intent to cheat or defraud the creditors of the mortgagor. It being held as the law of the case that the refiling of the mortgage, with a proper certificate indorsed thereon, prior to the receipt of the execution by the sheriff, restored and revived the mortgage as against creditors and purchasers, it becomes unnecessary to consider the other questions presented, so far as they arise under their second mortgage."

The case of *Newell* v. *Warner* it is true was reversed by the Court of Appeals on another point, but the lien of the mortgage was held good. It was there held (as suggested by the Supreme Court) that under the New York Statute, in order to preserve the lien of a chattel mortgage through successive years,

but one refiling was necessary, and the question of the time when the judgment lien must attach in order to take priority was, therefore, not material. It may be remarked, also, that in the opinion rendered in the case of *In re New York Economical Printer Co.*, 6 A. B. R., 615, there is a dictum of the court to the effect that the New York cases which we have cited are inconsistent with the opinions of the Court of Appeals, citing several cases which do not justify the dictum, and no one of which passes upon the precise point which we are here discussing.

In another case in the New York Court of Appeals which was not cited in the Economical Printer Co. case, namely: *Marsden* v. *Cornell*, 62 N. Y., 215, decided in 1875, the opinion in the case of *Swift* v. *Hart* was criticised, but the criticism apparently goes only to that portion of the opinion wherein the court said that a second filing of a chattel mortgage "may be claimed in the light of an original filing." And it is important to note that the later case of *Nixon* v. *Stanley*, decided in 1884, cites with approval and follows *Swift* v. *Hart*. The criticism of the cases which we have cited in the opinion in the case of *In re New York Economical Printer Co.*, is not well considered and seems wholly unwarranted on the authority of the New York cases cited.

In view of the fact that the Illinois courts never have passed on the question of the validity of successive renewals of a chattel mortgage, and that it has been held that the renewal provisions of the Statute are liberally to be construed, it is sub-

mitted that even if the judgment creditors did obtain liens, such liens could not possibly take precedence over the lien of appellant's trust deed.

In our argument, we have discussed at some length the question of the proper interpretation of the Illinois Mortgage Act, because, as we have said, the question was raised by the pleadings and argued in the courts below. In our view of the case, however, this appeal must be decided not on any question of the interpretation of the Chattel Mortgage Act, but on the question of the validity of the alleged lien of the judgment creditors, and of the rightfulness of the order of subrogation. That order, we submit, was grossly inequitable, and its entry clearly was an abuse of discretion on the part of the referee. But even if that order be allowed to stand, it is, in fact, a nullity for the judgments and executions issued thereon, under the facts, clearly established, and admittedly true in this case, did not operate to create liens on the property of the bankrupt. The burden of establishing the judgment lien was upon appellee and such liens could be established in one way only, and that by showing a compliance with the statute. Such compliance appellee has not shown.

It is, therefore, respectfully submitted that the judgment of the Court of Appeals was wrong, and that it should be reversed.

Respectfully submitted,

Edwin H Cassels

Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

NO. [redacted]38

EDWARD H. FALLOWS, TRUSTEE, APPELLANT,

vs.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, TRUSTEE IN BANKRUPTCY OF THE TENG-WALL COMPANY, BANKRUPT, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANT IN REPLY.

EDWIN H. CASSELS,
Counsel for Appellant.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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BRIEF OF ARGUMENT FOR APPELLANT IN REPLY TO ARGUMENT FOR APPELLEE.

MAY IT PLEASE THE COURT:

As to the greater part of the argument of appellee, appellant is content to rest his case on his original brief. There are, however, some points discussed by appellee to which we deem it proper to reply.

I.

Resort to Section 67f of the Bankruptcy Act was necessary in any event in order that appellee might prevail.

After a long argument in which it is contended that, notwithstanding the inequity of their origin, the judgments obtained on the judgment notes became valid liens; that the referee properly made the order of subrogation, and that such alleged judgment liens took precedence over the lien of appellant's trust deed, appellee finally takes the position, absolutely untenable in Illinois, as elsewhere, that it was entitled to object to appellant's mortgage and to contest the valadity of its lien, "without resorting to the liens of the execution and without the order of subrogation," on the ground that the words "any third person," as used in the Illinois statute, include ordinary contract creditors. (Appellee's brief, 66-69.)

Such is not the law in Illinois, nor is it the law elsewhere, where a similar statute in regard to chattel mortgages is in force. The law in Illinois is the same as in Virginia. *Holt* v. *Henley* (No. 229, United States Supreme Court, October Term, 1913.) Advance Opinions Law Ed., April 15, 1914, p. 459; and in Kentucky; *Re Watson*, 201 Fed., 962. *It is well settled in Illinois that a mortgage valid as between mortgagor and mortgagee is valid also as against general contract creditors;* and it is not denied that appellant's mortgage was not valid as against the bankrupt—the mortgagor. In all the long line of

Illinois decisions we find no departure from the rule stated in *Union Trust Company* v. *Trumbull*, cited in our original argument (page 7) and very succinctly stated in *Allcock* v. *Loy*, 100 Ill. App., 573, at p. 575, where in speaking of this particular provision of the Illinois chattel mortgage statute, the court said:

> "The third person that may avail of the statute must have an interest in the property, such as that of a subsequent purchaser, subsequent incumbrancer, lienor, judgment creditor, or an officer, bailiff, or custodian in possession, by virtue of a valid writ, execution or warrant."
>
> Citing, *Sumner* v. *McKee*, 89 Ill., 127.

In all the Illinois cases where a third person has successfully questioned the lien of a chattel mortgage valid as between the parties thereto, such person has had an interest of one of the kinds or classes enumerated in the case of *Allcock* v. *Loy*, *supra*.

In the case of *Stewart* v. *Platt*, 101 U. S., 731, cited in our original brief and argument at page 7, a similar question was before the United States Supreme Court on appeal from the Circuit Court of the United States for the Southern District of New York. There the statute provided that a chattel mortgage not followed by a change of possession should be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof should be filed as directed by the statute. In this case it appeared that Stewart had let certain property to the Lelands and held as security for the payment of the rent several chattel

mortgages. The Lelands afterwards went into bankruptcy and Platt was their assignee. The validity of the lien of the mortgages was questioned by certain judgment creditors on the ground that the mortgages were not filed in the city or town where the mortgagors resided, as provided by the statute. The Circuit Court held that the mortgage was invalid because of its defective record, which amounted, in fact, to no record at all, and decreed that the claims of the execution creditors should be paid out of the proceeds of the sale of the mortgaged property, and that the residue should be paid "to the assignee (in bankruptcy) for the purposes of the trust." In other words, the Circuit Court held in accordance with the principle contended for by appellee. The Supreme Court affirmed the decree in so far as it held that the judgment liens should first be satisfied, *but reversed the decree in so far as it directed that the balance should be paid to the assignee in bankruptcy. In other words, the Supreme Court held that as against the general creditors the Stewart mortgages were good.* This Court said, at pp. 738-739:

> "In *Yeatman* v. *Sav. Inst.*, 95 U. S., 764, 24 L. Ed., 589, we held to be an established rule that, 'except in cases of attachments against the property of the bankrupt, within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens and incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands

of the bankrupt. *Crown* v. *Heathcote*, 1 Atk., 160; *Mitchell* v. *Winslow*, 2 Story, 630; *Gibson* v. *Warden*, 14 Wall., 244, 20 L. Ed., 797; *Cook* v. *Tullis*, 18 Wall., 332, 21 L. Ed., 933; *Donaldson* v. *Farwell*, 93 U. S., 631; 23 L. Ed., 993; *Jerome* v. *McCarter*, 94 U. S., 734, 24 L. Ed., 136. He takes the property in the same "plight and condition" that the bankrupt held it. *Winsor* v. *McClellan*, 2 Story, 492.'

The decree below is plainly in contravention of this rule. Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the mortgagors and the mortgagee. *Lane* v. *Lurz*, 1 Keyes, 213; *Westcott* v. *Gunn*, 4 Duer., 107; *Smith* v. *Acker*, 23 Wend., 653. Suppose the mortgagors had not been adjudged bankrupts, and there had been no creditors, subsequent purchasers, or mortgagees in good faith, to complain, as they alone might, of the failure to file the mortgages in the towns where the mortgagors respectively resided. It could not be doubted that Stewart, in that event could have enforced a lien upon the mortgaged property in satisfaction of his claim for rent. The assignee took the property subject to such equities, liens or incumbrances as would have effected it, had no adjudication in bankruptcy been made. While the rights of creditors, whose executions preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert in behalf of the general creditors, no claim to the proceeds of the sale

> of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgagors and the mortgagees, the chattel mortgages were and are unimpeachable for fraud, or upon any other ground recognized in the Bankrupt law."

To sustain its position appellee cites *in re Beckhaus*, 24 A. B. R., 380; 177 Fed., 141. A careful reading of the opinion in that case shows that *it clearly has no application to the case at bar.* In that case it appeared that Beckhaus had been adjudged bankrupt in October, 1907. In March, 1907, Beckhaus had made an agreement with the petitioner, Rasmussen, and other pre-existing creditors, whereby Beckhaus transferred certain property to Rasmussen to hold in trust for the benefit of the creditors. This agreement was never recorded and no possession was taken. The sole question was whether or not the transfer was a *preference* under the provisions of Sections 60a and 60b of the Bankruptcy Act. It was held that inasmuch as every such transfer should be recorded under the laws of Illinois in order to be valid as against any third person, and since the four months' period under the provision of Section 60-a does not expire by express terms of the statute, until four months after the recording, such a transfer was a preference within the meaning of the act.

It was found at the hearing before the District Court that Beckhaus was insolvent in March, 1907; that he intended to prefer the creditors for whose benefit the agreement was made, and that these creditors had reasonable cause to believe that Beck-

haus intended by such transfer to give them a preference, thereby bringing the case squarely within the terms of Section 60-b of the Bankrupt Act, which provides that under such a state of facts a preference shall be voidable by the trustee.

The court, in its opinion (pp. 386-387), discusses the question of what is meant by a "third person," as used in the Illinois statute, and it is upon this discussion that appellee seeks to justify its position. The statute provides that no mortgage, trust deed or other conveyance of personal property, having the effect of a mortgage or a lien shall be valid as against the rights and interests of "any third person" unless possession is given, or the instrument is acknowledged and recorded, etc. Under the provisions of Section 60-b of the Bankruptcy Act, the court held that the trustee had a right to object to the lien claimed by Rasmussen, because, under the facts, such lien was, *by express provision of the Bankruptcy Act*, made voidable by the trustee; and, for the purpose of determining whether or not, under the provisions of Section 60-a and 60-b, the lien claimed by Rasmussen was invalid, the words, "third persons" would be broad enough to include the trustee and the creditors whom he represented, but such a construction would not be at all applicable to the case at bar. The Beckhaus case did not involve the question of the validity of an honest lien, or the precedence of two asserted liens. *It involved the question of a secret lien—a fraudulent transfer—which never had been recorded*, and which, it was held, under the express terms of the

Bankruptcy Act, was voidable by the trustee. Could appellee claim that the execution of appellant's mortgage was a preference? The case at bar does not involve the question of a secret lien or a fraudulent transfer. It involves only the question of the precedence of the lien created by the trust deed, and those liens, if any, created by the executions. In *Long* v. *Cokern*, 128 Ill., 29, cited in the opinion in the Beckhaus case, the controversy was between a mortgagee whose mortgage was not acknowledged and a subsequent *bona fide* purchaser, who clearly under the well settled rule in Illinois, had a right to contest; and the use of the word "creditor" in that opinion clearly is used as defined in *Allcock* v. *Loy*, *supra*. It is interesting to note that the position of counsel for appellee in this regard is refuted by the passage from the opinion of this court in *Security Warehousing Co.* v. *Hand*, 206 U. S., 424, quoted on page 52 of his brief.

Clearly any rights of the appellee must be predicated solely upon the validity of the alleged liens obtained under and by virtue of the executions, as is admitted by counsel for appellee on page 10 of his brief where after having cited Section 67f of the Bankruptcy Act and Sections 1 and 4 of Chapter 95 and Section 9 of Chapter 77 of the Illinois statutes, he states:

> "By employing these three statutes above enumerated as base, fulcrum and lever, the appellee as trustee in bankruptcy, has succeeded in the courts below in lifting the weight of appellant's chattel mortgage from the assets of the bankrupt estate."

II.

Appellant was entitled to be heard on the application for the order of subrogation, and its answer must stand.

Appellee devotes many pages of its brief (pp. 39-47) to a discussion of the question of whether appellant was entitled to notice of the application for the order of subrogation and whether or not the answer of appellant to the petition of appellee for subrogation was properly filed. Appellee takes the position that the only parties entitled to notice under the statute are the execution creditors, and, that being so, it must follow that although the appellant received notice (Printed Record, p. 30) and came into court in response thereto, his answer was improperly filed. Appellee admits that after the trustee in bankruptcy had attacked appellant's lien, appellant would have a standing in court, but not till then. If he could come in after the filing of the objections to the lien of his trust deed, he certainly could raise the point that the executions created no liens, that the order of subrogation was nugatory or improvident and that his lien was valid. These points were raised by the appellant in his answer in this case. (Printed Record, pp. 11-14, 30.) It became a part of the record. Appellant filed no further or other pleading. Appellee did file objections to appellant's lien three days after the filing of appellant's answer. At most all appellee really says, then, is that the answer was filed prematurely, and even if this be admitted, appellee cannot now take any ad-

vantage from it because appellee did not object on that ground. The appellee objected to the answer solely on the ground that it constituted no defense to the petition and the referee heard the application on the petition appellee and the answer of appellant; and found that the answer was "insufficient as not constituting a defense to said motion and petition, and entered the order of subrogation in accordance with the prayer of the petition. (Printed Rec., 2, 14, 15, 30.) If appellant did have a standing in court on August 25, as is admitted, how now can appellee justify its position that appellant could not appear on August 22 in response to a notice which the referee found was duly given to appellant (Printed Rec., 15, 30), and (no one objecting) present the very same things that admittedly it could have presented three days later, and which were actually presented on a motion by appellant to set aside the order of subrogation, which was denied on February 11, 1911. (Printed Rec., 5.)

If it be admitted that appellant was not *entitled* to notice, it would not follow that he might not properly be notified and might not properly appear and be heard by answer to the petition or otherwise. Appellant could have had an order requiring all notices of material motions to be served on him. Appellant, as a creditor and lienholder, or only as a creditor, was a party to the bankruptcy proceedings and entitled to be heard on any motion affecting his rights. This was an equitable proceeding. Appellant certainly was a *proper* party to any proceeding affecting the bankrupt's estate. Appellant's answer to the petition of appellee for subrogation must stand as a part of the record.

III.

The executions of the judgment creditors were not delivered to the sheriff to be executed and hence the judgment did not operate to create liens on the bankrupt's estate.

Several pages of appellee's brief are devoted to a discussion of the meaning of the word "service." (Appellee's Brief, 12-21.) This is not a controversy which in any way involves a quibble over the meaning of a word. The application for the order of subrogation was heard on the petition of appellee and the answer of appellant. (Printed Rec., 30.) The petition and answer were therefore taken as true, the answer adjudged insufficient and the order of subrogation entered. No evidence was heard. The statement of the referee that the executions were placed in the hands of the sheriff for service is, as stated in our original brief at page 9, fully in accord with the allegations of appellant's answer and a finding that these allegations were true. The fact is that the executions were not placed in the hands of the sheriff for the purpose of levy and making the amount due of the judgments. That was not a part of the scheme of the bankrupt in executing the judgment notes or the creditors in obtaining judgments. *The vital point is that the judgments were not placed in the hands of the sheriff "to be executed" and thus they could not become liens under the Illinois statute.* The petition of appellant for subrogation did not even *allege* compliance with the statute in that the executions were delivered to the sheriff "to be exe-

cuted," but merely stated that "executions were issued on said judgments to the sheriff of Cook County." (Printed Rec., 10.) Yet on a hearing on the petition and answer, an answer setting up the noncompliance with the statute and the invalidity of the alleged liens and the inequity of the acts of the bankrupt and the judgment creditors, the order of subrogation was entered. Can there be any question as to the error in the entry of this order? It was an inequitable order then and nothing later occurred in the case to purge it of its inequity.

Counsel places much reliance on the opinion in *Gouwens* v. *Gouwens*, 237 Ill., 506 (Appellee's brief, pp. 19-20), and quotes from the opinion a passage on page 514, where the Court quotes from Freeman on Executions to the effect that the plaintiff need not take pains to inform the Sheriff where property subject to the writ may be found, and that is sufficient for the purpose of creating a lien on real estate if the writ is placed in the officer's hands for service. This quotation from Freeman relates solely to the duty of the Sheriff, or other officer, to whom a writ is delivered, and the Court quoting from this opinion, cannot be considered in any way as holding that a writ delivered to the Sheriff only for the purpose of serving it upon the defendant, would be effective to create a lien. Of course, it is the duty of the Sheriff to obey the writ. In the Gouwens case it was found as a fact that the writ was delivered to the Sheriff generally and not for a specific purpose, as was the delivery of the writ in the case at bar. *Gouwens* v. *Gouwens* is no authority for the proposition that a delivery of a writ to

the Sheriff for mere service and not to be fully executed will be sufficient to create a lien under the statute. The court had this matter clearly in mind when it said on page 512 of the opinion:

> "The fee allowed by law for receiving and filing an execution and allowing it to expire without any effort to serve it *or levy* upon the property, and then returning it, could not have exceeded 20c. * * *"

An execution to be effective; that is to say: an execution to be executed must be both served and levied, for its object is, as stated by the court in the latter part of the quotation from the opinion in appellee's brief (page 20) to obtain satisfaction of the judgment on which it issues. This was made clear by the court in its opinion in *Pease* v. *Ritchie*, 132 Ill., 638, where it is said, at pp. 645-646:

> "The object of issuing an execution is to collect the judgment; but that object can not be carried out unless the execution is placed in the hands of an officer for collection. The only conclusion we are able to reach, when the purpose of the statute is kept in view, is, that an execution can not be said to be issued, within the meaning of the statute, until it is delivered to the sheriff to execute."

The Illinois Statute follows the English Statute, 29 Chas. II., Chapter 3, Sec. 16, where it is provided that "no *fieri facias* or other writ shall bind the property or goods, but from the time such writ shall be delivered to the Sheriff to be executed." And nowhere in the decisions of the courts in the states which have adopted this statute, do we find that a delivery of an execution for anything less than everything implied in the words, "to be executed" is effective to create a lien.

IV.

The position of appellee in claiming the benefit of the alleged liens is wholly inequitable.

Appellee throughout its whole argument seems to lose sight of the fact that this cause is an equitable proceeding and that the rules of equity must apply.

Section 2 of the Bankruptcy Act expressly gives to courts of bankruptcy such jurisdiction at law and in equity as will enable them fully to exercise the powers granted them by the Act. Proceedings in bankruptcy generally are in the nature of proceedings in equity. This Court so held in *Bardes* v. *First National Bank of Hawarden*, 178 U. S., 524, where Mr. Justice Brewer said, at page 535 of the opinion:

> "Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence conferring on the courts of bankruptcy 'such jurisdiction at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law, and not in equity."

No rule is better established than that a court of equity will refuse to interfere to grant relief in any matter or transaction where the relief asked for is not fully in accord with those basic principles of good faith and honest dealing, upon which the integrity of all business depends. He who comes into equity must come with clean hands. An appeal for relief is addressed to the moral sense of the chan-

cellor. A court of equity is a forum of conscience and nothing but a cause of action founded on good faith and honest dealing can be made the basis of equitable relief. As this Court said in *Deweese* v. *Reinhard*, 165 U. S., 386, at page 390:

> "Something more than the absence of legal title is necessary to call into action the process of a court of equity. The right, whatever it may be and from what source derived, must be not only one not protected by legal title, but in and of itself appealing to the conscience of a chancellor. A court of equity acts only when and as conscience commands and if the conduct of the plaintiff be offensive to the dictates of natural justice, then whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

Here the appellee comes into a court of equity seeking to supplant a lien admittedly good against the bankrupt and as well good as against contract creditors and bases its claim on liens alleged to have been obtained by judgments of certain creditors obtained on judgment notes executed on the day preceding the day of the date of the filing of the petition in bankruptcy, and on the same day delivered to creditors who had full knowledge of appellant's lien, —judgment notes executed and delivered at the instigation and connivance of the bankrupt. The indebtedness evidenced by these notes was contracted before their delivery with full knowledge on the part of the payee creditors of appellant's lien. Here we have judgment notes given and judgments entered with full knowledge on the part of the bankrupt and the payees that bankruptcy proceedings were immi-

nent and would be instituted on the following morning, and executions issued on the judgments without any possibility of their being executed by levy. The bankrupt and the judgment creditors never intended that executions actually would be levied and all that occurred was simply and solely a part of a scheme on the part of the bankrupt and the note holders by subterfuge, having on its face some of the indicia of regularity, wrongfully to defeat an honest lien theretofore recognized as valid by all. The holders of the judgment notes did not seek judgments in the State Court for the only legitimate purpose for which judgments might be entered in that court, namely, the collection of their debts by means of the process of that court but solely for the purpose of placing the trustee in bankruptcy later to be chosen in a position where it might be able to attack a valid lien.

The referee in his opinion states (Printed Record, p. 30):

> "Notice was given under said petition and answer was filed thereto by Edward H. Fallows, trustee, charging that the judgments, etc., entered up were not in good faith; that executions were not issued with intent that they should be levied on the property of the bankrupt, that said executions never became a lien; that the executions in question were entered upon judgment notes; that said judgment notes were executed without proper authority of the board of directors, and each and all them were void; that they were entered the day preceding the filing of the petition in involuntary bankruptcy and the said notes were made with the knowledge on the part of both Tengwall Company and the payee that bankruptcy proceedings were in contemplation; and it was the intention on the part of the bankrupt as well as the payees that the

judgment notes should not be forced against them by levy of executions; but, on the contrary, it was the intention that they should be used solely for the purpose of asserting a lien against certain property of the bankrupt, and especially to the prejudice of the rights of the respondent under a chattel mortgage executed by the bankrupt.

That the Tengwall Company was indebted in the sum of $20,000 secured by chattel mortgage, and that all the indebtedness represented by the aforesaid judgments was contracted with full knowledge of the existence of the said chattel mortgage; that the mortgage was in full force and effect on said third day of June and that the creditors had full knowledge of the said mortgage and had always dealt in connection with contracting the indebtedness represented by said notes on the understanding that the mortgage was a valid lien; charges a scheme between the officers of the bankrupt and the aforesaid judgment creditors, etc.

With reference to the issues presented by the said answer it may be observed that the statute refers to notice being given. Judge Seaman, in delivering the opinion of the Circuit Court of Appeals, 7th Circuit, *Reardon* v. *Rock Island Car Co.*, 22 A. B. P. 26 (p. 31), held that the notice in question was only intended for the benefit of the judgment creditors as being the only parties interested. Here, however, the mortgagee who is hurt by the preservation of the judgment lien interposes an answer. I am of the opinion that whatever rights the mortgagee has are capable of protection when the question arises directly on the validity of his security."

and further (Printed Record, page 31):

"I fail to see anything in the proposition that the conduct of the bankrupt's officers in giving judgment notes, even with the intention, as may

be perhaps inferred, that the same should be used for the purpose of enabling the trustee to attack the chattel mortgage should be considered as a fraudulent act."

Counsel for appellee, in his argument in this Court, states (Appellee's Brief, page 48):

> "Whether or not the judgments were entered on confession at the instigation of the Tengwall Company, and for the purpose of giving the plaintiffs a vantage point of attack on the validity of appellant's mortgage, this did not lessen or impair the effect of the judgments or of the liens of the executions issued thereon. They and the executions were immune from attack by appellant."

Counsel for appellee further states (Appellee's Brief, pages 65, 66):

> "Counsel has seen fit to attack the judgments as collusive. 'Collusion' is an ugly word and means, in general, a secret arrangement or co-operation for a fraudulent purpose, and conveys the idea of a wrongful purpose for an unlawful object. *This cannot be predicated of the action of the Tengwall Company and of certain of its creditors* to enable the general body of creditors thereafter to take advantage of a void or voidable transaction."

Here we have the frank admission of counsel that the action (the execution of the judgment notes and the obtaining of the judgment) taken was the "action of the Tengwall Company and of certain of its creditors." Not the action of the creditors, but the joint action of the Company and its creditors. The creditors could not have had the judgment notes without the co-operation of the bankrupt. Why were these creditors, with claims in an amount aggregating a safe margin only over the amount of appel-

lant's bonds, singled out for preference from the whole body of creditors?

The bankrupt in the trust deed had solemnly covenanted that it would "*suffer no lien which shall have priority to this mortgage to be created or placed upon the property conveyed or mortgaged hereby, or any part thereof, and will do all acts necessary to be done to keep valid the lien and priority of these presents upon the property and franchises hereby conveyed.* * * *" (Printed Record, page 7.) Yet in the face of this covenant, and with full knowledge of its provisions on the part of both the Company and the creditors, the Company deliberately (if its scheme was to operate as intended) breaks its covenant. Now, we have the appellee who stands in the shoes of the Company and (by virtue of the order of subrogation) in the shoes of the judgment creditors, with no greater rights and chargeable with all the inequities of the Company and the judgment creditors, petitioning a court of equity to decree that these same creditors shall profit by action based on a breach of contract on the part of the bankrupt company to which breach the creditors were a party. Is this equity? Shall these creditors or any other creditors be allowed to profit by a deliberate breach of contract—a violation of the fundamental principles of honesty and fair dealing?

Appellee has stated (Appellee's Brief, p. 10) that by employing the three statutes cited on pages 4, 5 and 6 of its brief as "base, fulcrum and lever," it has succeeded in lifting the weight of appellant's chattel mortgage. We submit that appellee must employ something more than these three statutes if

it finally is to prevail. It must employ (as it has employed thus far) a situation brought about by a deliberate breach of contract on the part of the bankrupt and the judgment creditors before any one of these statutes would have the least bearing on the controversy.

While we agree with counsel for appellee that the main purpose of a bankruptcy proceeding is to divide an insolvent's estate *pro rata* among his creditors (Appellee's Brief, p. 49) we are referred to no principle of law or of equity which, in order to bring about such *pro rata* distribution, will sanction a breach of a lawful contract, and the deliberate violation of the fundamental principles of business honour.

The judgment of the Court of Appeals was wrong and it should be reversed.

Respectfully submitted,

Edwin H Cravens

Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1913.

No. [redacted] 69

EDWARD B. PARDOW, Trustee,
Appellant,

vs.

[illegible]

Appeal from the United States Circuit Court of Appeals for the [illegible] Circuit.

BRIEF FOR APPELLEE.

HERMAN FRANK,
Counsel for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

No. 386.

EDWARD H. FALLOWS, Trustee,
Appellant,

vs.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, Trustee in Bankruptcy of THE TENGWALL COMPANY, Bankrupt,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The statement of facts contained in appellant's brief, while in the main correct, contains matters which we shall demonstrate hereafter have no proper place in the record. In order that there may be no confusion concerning the real issues in the case, we make the following statement: On June 3, 1910,

seven judgments, aggregating an amount exceeding twenty-five thousand dollars, were entered by confession in the Superior Court of Cook County against the Tengwall Company, and on the same day executions on these judgments were issued to the Sheriff. On the next day a petition in bankruptcy was filed against the Tengwall Company, and thereafter the Tengwall Company was adjudged a bankrupt, and appellee herein appointed trustee of the bankrupt. Thereafter, on petition of appellee by order of the District Court, under Section 67f of the Bankruptcy Act, the liens of the executions issued on these judgments were preserved and appellee subrogated thereunder. After the order preserving the liens of the judgments subrogating appellee was entered, appellee filed its objections to the claim filed in the bankruptcy proceedings by appellant, in which claim appellant sought to assert the lien of a chattel mortgage for twenty thousand dollars ($20,000) on all the property of the bankrupt. Appellee in its objections among other things claimed to have the right to attack this mortgage by virtue of its subrogation to the execution liens above referred to. One of the grounds of attack urged by appellee to the chattel mortgage was that the lien provided by statute had expired, the Illinois statute providing that the lien of a chattel mortgage is good for three years after recording, and one year in addition in case a renewal affidavit should be filed; that in this case appellant had once so renewed the mortgage for a year, after the three-year period had expired, and was not entitled to

keep the mortgage alive by additional and successive renewals, that even if he was, the second renewal was filed one day too late.

There are other grounds of objection stated, which will be discussed hereafter.

The courts below sustained the objections of appellee to appellant's chattel mortgage. Hence this appeal.

BRIEF OF ARGUMENT.

In attacking appellant's chattel mortgage lien, appellee, as trustee in bankruptcy of Tengwall Co., has relied upon and invoked the aid of the following statutes:

First. Section 67f of the Bankruptcy Act, which reads:

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

Second. Chapter 95 of Hurd's Revised Statutes of Illinois, Sections 1 and 4, as follows:

> "Section 1. That no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession

thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage.

"Sec. 4. Such mortgage, trust deed or other conveyance of personal property acknowledged, as provided in this act, shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded, or in case the mortgagor is not a resident of this state, then in the county where the property is situated and kept, and shall thereupon, if *bona fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or obligation, or extension thereof, made as hereinafter specified: Provided, such time shall not exceed three years from the filing of the mortgage, unless within thirty days next preceding the expiration of such three years, or if the debt or obligation matures within such three years, then within thirty days next preceding the maturity of said debt or obligation, the mortgagor and mortgagee, his or their agent or attorney, shall file for record in the offices of the recorder of deeds of the county where the original mortgage is recorded, also with the justice of peace, or his successor, upon whose docket the same was entered, an affidavit setting forth particularly the interest which the mortgagee has by virtue of such mortgage in the property therein mentioned, and if such mortgage is for the payment of money, the amount remaining unpaid thereon, and the time when the same will become due by extension or otherwise; which affidavit will be recorded by such recorder and be entered upon the docket of said justice of the peace, and thereupon the mort-

gage lien originally acquired shall be continued and extended for and during the term of one year from the filing of such affidavit, or until the maturity of the indebtedness or extension thereof secured by said mortgage: Provided, such time shall not exceed one year from the date of filing such affidavit."

Third. Chapter 77, Section 9 of Hurd's Revised Statutes of Illinois, provides:

> "No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the Sheriff or proper officer to be executed, etc."

Section 67f has received judicial construction in several cases, notably in *First National Bank of Baltimore* v. *Staake*, 202 U. S., 141-146, affirming the decision of the Circuit Court of Appeals, which is reported under the title "*Receivers, etc.* v. *Staake* in 133 Fed., 717-720.)"

The Circuit Court of Appeals, in deciding the case presented to it construes this section of the Bankruptcy Act as follows:

> "The wording seems clearly to contemplate that a creditor might obtain, by reason of his being a creditor of the bankrupt, a prohibited lien against property, which would not, if unaffected, pass to the trustee in bankruptcy, and it would appear that it was for that reason the clause in question was inserted, preserving the lien, if the court should so order, for the benefit of the estate, and vesting it in the trustee.
>
> "A primary object of the bankrupt law is to prevent preferences and compel equality among creditors of the bankrupt, and there can be no doubt that the sequestering of attachment liens, such as those in question in this case, for the

benefit of the general creditors, does produce equality and prevent preferences. The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors."

In affirming the judgment of the Circuit Court of Appeals, in 202 U. S., 141-146, Mr. Justice Brown, who delivered the opinion of the court, says:

"This section (67f) makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors, that is "for the benefit of the estate"—in other words the statute recognizes the lien of the attachments, but distributes the lien among the whole body of creditors.

The first provision contemplates the attachment of property to which the bankrupt has the complete, legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The sec-

ond clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy."

In *Rock Island Plow Company* v. *Reardon*, 222 U. S., 354, this court has also construed the provisions of 67f. Extracts from the opinion of the court in that case are found in a subsequent part of this brief (pp. 42, 61).

In the case of *In re New York Economical Printing Co.*, 49 C. C. A., 133, Judge Wallace has thus construed the statute (p. 137):

"Subdivision 'b', Section 67, Act July 1, 1898, c. 541, 30 Stat., 564 (U. S. Comp. St. 1901, p. 3449), preserves for the benefit of the estate in bankruptcy a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor, by an execution or a creditor's bill, has secured a legal or equitable lien upon mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceedings, his lien would inure to his own exclusive benefit; but, if acquired at any

> time within the four months it would be null and void, under subdivision 'f' of the section, except as preserved for the benefit of the estate, as provided in that subdivision and subdivision 'b'."

Chapter 95 of Hurd's Revised Statutes, Sections 1 and 2, is so unambiguous and unequivocal as not to require construction. Its application to the particular facts in this case is treated of in another portion of this brief (p. 23).

Chapter 77, Paragraph 9, of Hurd's Revised Statutes, *supra*, has been under consideration by this court in *Rock Island Plow Co.* v. *Reardon*, 222 U. S., 354, 362. In that case, as here, a trustee in bankruptcy was by order subrogated to the rights of certain judgment execution creditors. Mr. Chief Justice White, who wrote the opinion, says:

> "The claim of the trustee was in substance, 1, that delivery to the Sheriff of executions upon the Seehler and Cordage judgments operated without levy to create liens upon the real and personal property of Brown, the judgment debtor within the county; 2, that such liens were paramount to rights in the property possessed by a vendor under a contract of conditional sale; and 3, that the effect of the subrogation order was to render inoperative as a preference the liens obtained by the judgment creditors through their executions, and to preserve such liens as of the date of the filing of the proceedings in voluntary bankruptcy for the benefit of the estate in bankruptcy. That the Circuit Court of Appeals rightly held the affirmative of these three propositions we entertain no doubt. Upon the first two propositions that court said (p. 658):

> "'As the law of Illinois must govern the answer to both questions, and the rule there is well settled, as we believe, for an affirmative answer to each, no difficulty appears in the solution. Paragraph 9 of Chapter 77, Rev. St. Ill., 1874 (2 Starr & C. Ann. St., 1896, p. 2336), provides: "No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer to be executed." This is a modification of the rule at common law which created a lien from the issuance of the writ, and its effect to create a lien in favor of the execution creditor is recognized in numerous decisions noted in Starr & C. Ann. St., *supra*.'"

By employing the three statutes above enumerated as base, fulcrum and lever, the appellee as trustee in bankruptcy, has succeeded in the courts below in lifting the weight of appellant's chattel mortgage from the assets of the bankrupt estate.

Having thus set forth the statutory provisions applicable to the facts in this case we present in chronological sequence the following conceded and salient facts:

1. Execution and delivery of a chattel mortgage by the Tengwall Company to Edward H. Fallows (appellant) to secure the payment of bonds aggregating $20,000 payable October 1st, 1920. The mortgage bears date and was acknowledged October 7, 1905.

2. Recording of the chattel mortgage in Recording Office of Cook County, Illinois, November 31, 1905.

3. First renewal affidavit of the chattel mortgage dated September 23, 1908, and filed October 5, 1908.

4. Second renewal affidavit of the chattel mortgage dated October 4, 1909, and filed October 6, 1909.

5. Entry of the judgments for $25,000 against the Tengwall Co. on June 3, 1910.

6. Issuing of executions on these judgments and delivery thereof to the Sheriff for service June 3, 1910.

7. Filing of bankruptcy petition against Tengwall Co. on June 4, 1910.

8. The Tengwall Co. adjudicated bankrupt June 7, 1910.

9. Election of appellee as trustee in the matter of Tengwall Co. Bankruptcy August 9, 1910.

10. Order of the Referee, preserving the lien of the executions and subrogating the trustee to all rights thereunder, August 22, 1910.

11. Filing of appellant's claim asserting the lien of the chattel mortgage against the assets of the bankrupt's estate, August 9, 1910.

12. Filing of appellee's objections to appellant's claim for a lien, August 25, 1910.

13. The decree of the court sustaining the objections.

All of the foregoing is shown in the Referee's report. (Printed Record, 2-6.)

Upon the theory that the chattel mortgage, although valid between the parties thereto was void because of non-compliance with the provisions of the Illinois Statute, concerning recording and renewal, as against execution creditors and *ergo* as against the appellee who under the enforcement of the provisions of 67f of the Bankruptcy Act became

subrogated to the rights and liens of those execution creditors, the Referee, the District Judge, and the Circuit Court of Appeals have declared that as to appellee the mortgage was also void and have disallowed appellant's claim as secured. To paraphrase the language of Judge Morris, the writer of the opinion in the case of *Receivers, etc.*, v. *Staake*, *supra*, there is therefore in the facts in this case a literal gratification of the words of 67f.

THE EXECUTIONS BECAME LIENS ON THE PROPERTY OF THE BANKRUPT ON JUNE 3, 1910, THE DAY BEFORE THE BANKRUPTCY OF THE TENGWALL COMPANY, BECAUSE THEY WERE ON THAT DAY DELIVERED TO THE SHERIFF "FOR SERVICE." THE EXPRESSION "FOR SERVICE" IS SYNONYMOUS WITH "FOR EXECUTION" OR "FOR LEVY."

Appellant's main contention is that the executions never became liens (and therefore, the order of subrogation availed appellee not at all) because they were not, in the language of Chapter 77, Section 9 (Ill. R. S.), delivered to the Sheriff "to be executed" but merely "for service." He maintains in all apparent sincerity that by the expression delivery to the Sheriff for "service" is meant delivery to the Sheriff for the purpose only of having a copy thereof delivered to the defendant in execution. In this he is manifestly mistaken. The word "service" as applied to executions means "execution, levy and sale" and not only handing a copy of the writ to the defendant as claimed by appellant. On account of his strenuous insistence upon this point we have taken the liberty of discussing *in extenso*

the meaning of the word "service" as applied to a writ of execution. We therefore present the following strong array of authorities, conclusively showing that the words "service," "execution" and "levy" are convertible terms:

Worcester's Dictionary defines "service": "As applied to writs it properly means the *execution* of process."

Bouvier (2nd Vol. Rawles' Ed., p. 984) defines service as follows: "In practice, the *execution* of a writ or process, thus, to serve a writ of capias, signifies to arrest a defendant under the process."

In 35 Cyc., p. 1432, the word service has been defined to mean "execution of process."

In 3 Stroud's Judicial Dictionary, 2nd ed., at page 1836, it is said: " 'An execution served' has the same meaning as an 'execution executed'."

Among the English decisions we find the case of *Wray, Assignee of Catton* v. *Egremont*, 4 Barnewall & Adolphus, 122. We quote from the language of Judge Patterson:

> "The statute applies to cases where the distress is made and levied after arrest of the insolvent. Here it was made before. I doubt whether the word *levied* has, in this statute, any meaning different from the word *made*. The 21 Jac., I. c. 19., s. 9, enacts 'that all creditors having security for their debts by judgment, etc., whereof there is no execution or extent *served* and *executed* upon any of the lands, etc., of the bankrupt, before he shall become bankrupt, shall not be relieved upon any such judgment, etc., for more than a ratable part of their debts, etc., with the other creditors of the bankrupt.' Now it has been held that the words

> *served* and *executed* have the same meaning; and that an execution commenced by seizure before, but not finished till after, the act of bankruptcy is committed, was *served and executed* within the meaning of the statute (a)."

This case exhibits many points of similarity with the facts in the case at bar.

In *Gage* v. *Graffam*, 11 Mass., 181, the word "service" as applied to a writ issued to the Sheriff is used in the same sense as the word "execution." Thus at page 182 the court says:

> "The defendant pleads in abatement to this writ a defective *service*, or rather want of service, because, as he alleges, the return thereof is by a deputy sheriff. * * * when the defendant was at the time, as he avers, a deputy also of the same Sheriff. 'Processes are not, indeed, rendered void or defective in themselves, when the service happens to be by an officer standing in this relation to one of the parties. The service, in such case, is not proved by the return. * * * But if the defendant appears and answers, it is not error in the proceedings that service of process has been by an officer related to one of the parties. * * * The statute on this subject provides for the service by coroners of all writs and precepts, when the Sheriff, or either of his deputies, shall be a party to the same."

Reference to the context of the opinion in that case will show that the word service meant not the mere handing of the paper to the defendant named in the writ, but the carrying into effect the mandates of the writ.

In *Dalton Ingersoll Co.* v. *Hubbard*, 174 Mass., 307, the court construes a statute which authorizes a

constable to serve processes within his own town in any proper case where the subject matter involved does not exceed $300 in value. The court in the opinion used the word "served" as synonymous with "executed." *Vide* the following extract:

> "The only remaining question is whether the arrest was illegal and the recognizance void, because the arrest was made by a constable. The direction to *serve* contained in the execution includes constables as well as Sheriffs and their deputies. See Pub. Sts., c. 160, Sec. 5. The slight irregularity in regard to the jail to which the commitment should be made does not render the arrest illegal. It is contended with some force that a constable could not lawfully act, because the original judgment was for more than three hundred dollars damages. This amount had been reduced by payment to less than three hundred dollars before this execution was issued, and the execution was for a sum less than three hundred dollars. The constable acted under Pub. Sts., c. 27, Sec. 114. This section gives authority to a constable to *serve* process within his own town in any proper case where the subject matter involved does not exceed three hundred dollars in value."

In 8 Howard's Practice (N. Y.), 353, the Supreme Court, General Term, in passing upon certain proceedings, including the issuing of an order of arrest to the Sheriff, said (p. 355):

> "But the proceedings, on the part of the plaintiffs, have been entirely regular. The defendant, who is a non-resident, gave bail, which was not excepted to, and the Sheriff has made a formal and full return of the *service* of the order by himself; and the question in the case is, can the defendant set aside the proceedings without

> any fault on the part of the plaintiffs, or is his remedy against the Sheriff, or the man who arrested him? * * * If the *service* is good, the undertaking is good. And if we cannot look behind the return, there is no proof that the *service* is not good but, on the contrary, there is exclusive evidence that the Sheriff arrested the defendant."

In 17 Cyc., 994, the writer of the article on "executions" uses the following language:

> "If defendant dies after the execution is awarded and before it is served, it may, nevertheless, by the common law, be served upon all goods in the hands of an executor or administrator."

This certainly means an actual levy on the property itself.

In 25 A. & E. Ency. of Law (2nd Ed., 480) the author defines service as follows:

> "Service also means the judicial delivery or communication of papers; *execution of process.*"

In 19 Ency. of Pleading & Practice, 587, it is said:

> "A writ directed to the Sheriff cannot be regularly executed by the Coroner. When *service* is to be made by the latter, the direction should be to him *eo nomine.*"

Reference to the context and to the notes of the cases cited in support of the above doctrine shows that by "service" as there used is meant "execution" of process.

In Croker on Sheriffs, 3rd Ed., Sec. 39, p. 31, the learned author says:

> "The Sheriff may make 'return' to any

process or proceeding, whether the same was executed by himself in person or by his deputy, or the return may be made by the deputy who rendered the *service*. The true course, however, will be for the party making the *service* to make the return to the process also. But if the deputy who has made the *service* is dead, or has gone out of office, then the return must be made by the Sheriff."

At page 35, Sec. 44, the same author says:

"The return of the ministerial officer, upon returnable process, stating his official doings in the execution of such process, is conclusive between the parties to the suit, in the particular action in which such return is made. It is conclusive evidence in the action of the *service* of process therein. Nor can the return of due *service of process* be impeached in an action by the defendant in the process against the officer for false imprisonment, nor will it make any difference that the officer making the return *served* the process in his own case, where he might lawfully do so."

At page 212, Section 412, the author uses this language.

"But the plaintiff in an execution is not answerable for having made the deputy charged with its *service* his agent by giving him instructions to sell goods levied upon on credit, if the deputy does nothing in conformity with the instructions."

At page 147, Section 280, the author says:

"When process is delivered to any Sheriff for *service* which does not require the arrest of the defendant or the seizure of property, it will be immaterial to such officer whether such

process is regular or irregular, and he should serve or execute the same according to the command thereof, and make proper return thereto, if a return is necessary."

In Herman on Executions the word "service" is used in the same sense as "execution," thus:

> "The universal rule is that a Sheriff or constable, his authorized deputy, shall *serve* all process except as hereinafter shown. The same party who executes a writ of attachment should execute formal process (p. 203). 'Nor can he (the Sheriff) legally serve an execution on his deputy. A deputy is disqualified to serve when either he or his principal is the plaintiff in the action, has a direct interest in the process, or is entitled to the proceeds of the sale under it.' (Page 206.) 'Although the term of an officer has expired an officer is authorized to serve process until he has been officially notified that his successor has qualified' (p. 707). An execution issued at the request of the party to the action who is entitled by the judgment of the court or by law to have it issued in his favor, may control it without any interference on the part of the officer or the attorney. It is the process of the party causing its issue and no one but such party, his agent or attorney can control the *service* thereof, and either one may authorize the officer to depart from the regular and ordinary method of enforcing it (pp. 209, 210)."

In *Peck* v. *City Natl. Bank,* 51 Mich., 353, the meaning of the word "service" in connection with the issuing of an execution to the Sheriff was squarely presented to and decided by the court. The Michigan statute provides that the Sheriff shall be allowed certain fees "for serving an attachment for

the payment of money or an execution for the payment of money." The court, in construing the meaning of this word "service," in connection with the issuing of an execution, says (page 359): "SERVICE *of an execution includes every act and proceeding necessary to be taken by the Sheriff to make the money, and includes the sale of the property when necessary.*"

Appellant's counsel has argued that whatever the word "service" as applied to executions may mean in other jurisdictions in Illinois it has the particular limited meaning claimed by him totally at variance with the construction in vogue in other states. In complete refutation whereof we refer the court to the decision of the Supreme Court in *Gouwens* v. *Gouwens*, 237 Ill., 508-514. The court quoted with approval the interpretation placed upon the word "service" by Freeman on Executions—thus:

> "When the writ is received and no instructions are given, it is the duty of the officer to proceed with due diligence to execute it. 'No doubt a prudent plaintiff would, on delivering the writ to the officer, take pains to inform him where subject to the writ could be found and would at all times co-operate with the officers in their attempts to execute the writ. The plaintiff who pursues this course places the officer in such a position that his failure to at once proceed to levy gives rise to a presumption of negligence. But plaintiff is not bound to pursue this course. He need only place the writ in the officer's hands *for* SERVICE. *The officer must then make reasonable search and inquiry.*' (Freeman on Executions, 2d Ed., Sec. 252.) The same principle is announced in *Gilmore* v. *Davis*, 84 Ill., 487, where it is said (p. 489):

> 'We believe the doctrine to be, as the object of an execution is to obtain satisfaction of the judgment on which it issues, on its delivery to the proper officer it gives to the creditor a priority, because the law imposes the duty upon the officer to execute it without delay.' "
>
> *Gouwens* v. *Gouwens*, 237 Ill., 508-514.

Appellant claims with seeming confidence because of an Illinois statute entitled "Fees and Salaries," under the sub-title "Sheriff's Fees" (Hurd's R. S., Ch. 53, Sec. 53), the Sheriff's fees are fixed:

> "For serving a writ of attachment on each defendant, one dollar,"
>
> "For serving notice of execution and copy, one dollar seventy-five cents,"

that thereby the legislature has determined for all purposes the meaning of the word "service" as applied to executions. It will be observed that the statute fixing fees and salaries is entirely distinct from the one providing when and under what circumstances an execution shall bind the property of the person against whom it is issued. The latter provision is under a statute entitled, "JUDGMENTS, DECREES AND EXECUTIONS." (Chap. 77, Sec. 39, *supra.*)

We call the court's attention, in the first place, to the difference in verbiage between the paragraphs fixing the fees for the two items above enumerated. In the one case the fee is fixed for "serving a writ of attachment," and in the other for "serving a *notice* of execution and copy." Even in this statute has the legislature distinguished between serving a writ of attachment and serving notice of an execution, thereby implying that there is a vast difference between

the two; the phrase "serving an execution" is not used in the latter provision. What is provided to be served thereby is *notice* of execution and *copy*. This distinction is most significant and cannot be ignored. We maintain moreover that because the word has a certain significance in one statute, it does not necessarily follow that the word has the same meaning in another statute as it may have been used in different senses. (11 Cyc., 1147, and cases cited.)

It may be conceded that where the words of a statute are ambiguous or of doubtful import resort may be had to ascertain the meaning of such words to other parts of the same statute, the rule being that if in the same statute the word is used in one sense, that meaning generally will be ascribed to the word throughout the statute. But, in the figurative diction of one of the justices of this court: "The province of construction lies wholly within the domain of ambiguity." (*Hamilton* v. *Rathbone*, 175 U. S., 416, 421.)

There is no ambiguity in the Illinois statute relating to the effect of issuing an execution to the Sheriff, as we have shown; consequently it is unnecessary to resort to rules of construction.

We think that we have sufficiently established the meaning of expression "service of an execution" and that when the Referee found, as he did, that the executions in question were delivered to the Sheriff for service, he perforce found that they were delivered to the Sheriff for execution and for levy, and, as a corrolary, that these executions became liens upon the bankrupt's property on June 3, 1911, the day before the institution of bankruptcy proceedings.

APPELLANT'S CHATTEL MORTGAGE WAS VOID AS TO THIRD PERSONS, INCLUDING EXECUTION CREDITORS AND APPELLANT, BY REASON OF NON-COMPLIANCE WITH THE ILLINOIS STATUTES REGARDING RECORDING, FILING AND RENEWAL OF CHATTEL MORTGAGES.

One of the grounds upon which is predicated the invalidity of appellant's mortage is that, pursuant to the terms of the Illinois statute it ceased to become a lien for the reason that, in the first place, the original term of three years allowed by law having been once extended by a renewal for one year no further extension was allowed by law, the statute not providing for more than one renewal, and, secondly, that even if a second or successive renewal were allowed by the statute the second renewal was not filed within the time provided by the statute for the filing of renewals. For convenience we repeat some of the facts already detailed.

October 7, 1905, the Tengwall Company executed a chattel mortgage to the appellant, mortgaging all of its property. This mortgage was given to secure an indebtedness amounting to twenty thousand dollars, which indebtedness was evidenced by two hundred bonds of one hundred dollars each, the bonds being payable on the 1st of October, 1920, with interest payable semi-annually. The mortgage was recorded in the office of the Recorder of Cook County, Illinois, on November 1, 1905. On October 5, 1908, there was filed for record in the Recorder's office an affidavit of renewal, pursuant to the provisions of the statute. On October 6, 1909, *a year and a day* after

the first renewal affidavit was filed, a second renewal affidavit was filed in the Recorder's office.

The Illinois statute providing for the mode and terms of recording chattel mortgages is set out in full on pages 4-6 of this brief.

The courts below decided, and it is our contention here, that under the provisions of this statute the lien of a chattel mortgage in Illinois, as to third parties at least, does not exist for more than three years after it is filed for record, unless within thirty days next preceding the expiration of this period of three years a renewal affidavit is filed, upon complying with which requirement the lien of the mortgage is continued for *one year* from the date of filing renewal affidavit and no longer; that only *one* renewal affidavit may be filed; so that under no circumstances does the lien of a chattel mortgage exist in Illinois for more than four years after the time of original filing thereof; that the law does not provide for but in terms forbids the extension of this lien for more than one year after the expiration of three years from the date of filing, that is to say, but one renewal may be filed; and that when the time of said renewal period has expired the lien of the mortgage, as to all the world except the parties thereto, has spent its force; that even if more than one renewal affidavit is allowed to be filed under the statute, in this case the second renewal affidavit was filed one day too late, the first renewal affidavit having been filed October 5, 1908, and the last day on which to file a renewal affidavit being October 5, 1909, whereas it was filed October 6, 1909.

As we understand counsel for appellant, his contentions are threefold:

1. The statute allows successive annual renewals, so that the lien of a chattel mortgage in Illinois may be kept alive indefinitely provided renewal affidavits were filed annually.

2. The phrase in the act, "and thereupon the mortgage lien originally acquired shall be continued and extended for and during the term of one year from the filing of such affidavit," signifies that after the date of filing the renewal affidavit the lien is extended for a period of one year from the last day of the period in which the extension affidavit could have been filed, and not from the day the renewal affidavit was actually filed.

3. Assuming that the statute does allow successive annual renewals, and that the second annual renewal was filed more than a year from the date of filing the first renewal affidavit, the defect cannot be availed of by an execution creditor if the execution was issued after the second renewal affidavit was filed.

Now, as to the first point, little need be said. The plain and unmistakable language of the act excludes the idea of successive renewals. It has been the long-settled policy of this state to shorten the life of liens on personal property. Under prior Illinois statutes the lien of a chattel mortgage could be renewed for two years after the first period had expired. It may now be extended only one year. This indicates the desire of the legislature to restrict the period within which a chattel mortgage may be kept alive.

From 1845 down to the present time the chattel mortgage acts have undergone various changes and modifications. It will not serve any useful purpose to go into detail concerning these various changes, except incidentally to show that the case of *Keller* v. *Robinson*, 153 Ill., 458, cited by appellant in his brief in support of his theory that a chattel mortgage may be kept alive indefinitely by successive renewals, does not hold to that effect. We refer the court to an instructive dissertation upon the various chattel mortgage acts enacted before the present statute, contained in the case of *Silvus* v. *Aultman*, 141 Ill., 633. As shown in the *Silvus* case under the early acts the lien of a chattel mortgage, according to the statute, was good for two years from the time of recording, and it mattered not when the indebtedness to secure which the chattel mortgage was given, matured. Under later acts a chattel mortgage was void if the maturity of the debt extended beyond a certain period, and to such extremes have our courts proceeded that the Supreme Court in the *Silvus* case, *supra*, held that a chattel mortgage securing two or more notes, some of which were not due for more than two years from the time of recording the same, was void under the statute of 1874 and 1887, as against the creditors of the mortgagor, notwithstanding the fact that the mortgage gives the mortgagee in certain contingencies the right to declare all the notes due. Now, it was to avoid this harsh rule that the act was subsequently amended so as to give validity to a mortgage lien for a certain period, independently of the time of the maturity of the indebtedness; and this was all

that the Supreme Court meant in the case of *Keller* v. *Robinson*. The gist of that decision is shown at pages 463, 465 and 466 of the report, in the following language:

> "We think it clear that the amendment of 1891, in force when the mortgage in question was executed, was intended to, and does in clear and explicit terms, authorize the making of a chattel mortgage to secure an indebtedness due after the expiration of two years from the time it is filed for record, its validity after the two years depending only upon filing the required affidavit within thirty days next preceding the expiration of that period. In this case the property was seized by the Sheriff before the time within which, by the statute, such affidavit could be filed, and hence the mortgage was then valid and in full force and effect."

Here the court clearly holds that a chattel mortgage is not void because the maturity of the debt extended beyond the time limited by statute for the duration of a lien. A distinction is made between the duration of the indebtedness to secure which a mortgage is given and the duration of the lien, and nothing in that case can be construed to mean that under the provisions of the statute the life of a lien may be co-extensive with the life of the indebtedness. Whereas formerly if the time of the maturity of the debt exceeded the time allowed by law for the life of the lien, the mortgage was void, such is not now the law in the light of the amendments to the statute.

Appellant at page 31 of his brief argues:

> "It being established under the law, as it now stands (and as it stood at the time of the execution of the mortgage in this case) that there is

> no limitation placed upon the maturity of the debt, and that renewal of a chattel mortgage is permitted, it should follow, unless there are express words in the statute to the contrary, that the renewals provided for in Section 4 and mentioned in Section 5, may be made successively one after another until the maturity of the debt, thus keeping alive the security which is an incident of the debt, until the maturity of the debt."

Appellant in so arguing has plainly ignored the fact that the Supreme Court of Illinois has passed upon this very point in *Cook* v. *Thayer*, 11 Ill., 617. The court in that case construed the chattel mortgage statute of 1845, which reads as follows:

> "Any mortgage on personal property so certified should be admitted to record by the Recorder of the county in which the mortgagor shall reside at the time when the same is made, acknowledged and recorded, and shall thereupon, if *bona fide*, be good and valid from the day it is so recorded, for a space not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust may be left in possession of the mortgagor, provided that such conveyance shall provide for the possession of the property so to remain with the mortgagor."

The court will therefore see that the statute of 1845 was similar to the present statute, in that it treated of the lien of a mortgage, irrespective of the time of the duration of the debt. The point was raised in *Cook* v. *Thayer* that the provision authorizing the mortgagor to retain possession until default should be made in the payment of the note, which had three years to run from the date of the

mortgage, although the lien of the mortgage was authorized to exist for two years, rendered the mortgage fraudulent and void in law; but the court held otherwise and decided that although the indebtedness could run for more than two years the lien could exist for two years and no longer. The court at page 619 thus stated the proposition:

> "The mortgage in question contained a clause that the goods might remain in the possession of the mortgagor, and it was acknowledged and recorded long before the levy was made. But, it is insisted, that the provision authorizing the mortgagor to retain the possession, until default should be made in the payment of the note, which had three years to run; from the date of the mortgage, rendered the mortgage fraudulent and void in law. We think otherwise. The true meaning of the statute is, that a mortgage on personal property, duly acknowledged and recorded, and containing a provision that the property may continue in the possession of the mortgagor, shall, if made in good faith and to secure an honest debt, be good and valid against creditors and purchasers, for the space of two years, after the same is recorded; and not that a mortgage, which has a longer period to run, is without the protection of the statute altogether. It continues valid and operative for two years, whether the debt, which it is designed to secure, then becomes due or not. At the expiration of the two years it ceases to be valid, as against creditors and purchasers, unless the possession of the property is transferred to the mortgagee."

It will be perceived that the statute of 1887 provides that a mortgage shall only be valid if the time of the maturity of the debt shall not exceed two

years. The present statute, however, does away with that distinction, and gives a lien for a limited period irrespective of the time of the maturity of the debt, so that therefore the case of *Cook* v. *Thayer*, above cited, construing an act similar in the point above specified to the present statute, applies to the present statute and entirely demolishes counsel's theory; and it is not the law, as stated by him, that because the statute places no time limitation on the duration of the debt, therefore the theory of the law is that no time or limitation is placed upon the durafion of the lien.

The contention that if second successive renewals of the mortgage are sanctioned by the act, then the second renewal in this case was not too late, even if filed a day and a year after the first renewal affidavit was filed, is as futile as the first point. The language of the act not only negatives, but expressly forbids, such interpretation.

We preface our discussion upon this point by reference to the authorities holding that the provisions of the Chattel Mortgage Act must be strictly construed. From a very early period the authorities of the Illinois courts are unanimous upon this point. In *Porter* v. *Dement*, 35 Ill., 478, at page 480, the Supreme Court says:

> "The statute in regard to chattel mortgages is in derogation of the Common Law and should be strictly construed."

No decision can be found in this state in any wise limiting this doctrine, nor can any distinction be made as to *extensions* of the time of the lien. Thus

in *Griffin* v. *Henry*, 99 Ill. App., 284, at page 286, the court says:

> "The strict rule of construction which has obtained with reference to the execution, acknowledgment and recording of mortgages should apply to all attempts *to extend* the mortgage under the amendatory provisions contained in Section 4, Chapter 95, of the present revision of our statute."

The authorities cited by appellant at page 33 of his brief: *Cox* v. *Stern*, 170 Ill., 452; *Hamilton* v. *Seegar*, 75 Ill. App., 599; and *Fuller* v. *Smith*, 71 Ill. App., 576, do not in any way intrench upon this doctrine. They do not state the law as laid down by appellant. Counsel would have the court to construe the act so as to make the phrase "during the term of one year from the filing of such affidavit" read "during the term of one year from the last day of the period provided for the filing of such affidavit." This is doing violence to the language of the act and the statement of the theory carries with it its own refutation.

It is worthy of notice as having a most significant bearing upon this case that in those states where by statute the original lien of the mortgage may be extended by re-filing, the statutes provide in express terms for successive filing, and the result of our examination discloses that in fifteen states of the Union the original lien of a mortgage may be renewed; that the statutes in all of these states with the exception of Illinois expressly provide for successive annual, biennial or triennial renewals. In Illinois not only does the statute fail to provide in

express terms for successive renewals—in this omission the position of Illinois is unique—but the very language of the act excludes the idea of an extension of more than one year after the original term of three years. The wording of the act in unmistakable terms indicates that a chattel mortgage lien shall not last more than three years from the date of filing, and "the extension thereof as hereinafter specified," and thereinafter specified, is the provision that the lien may be extended for only one year.

As to the remaining point in support of the contention raised by appellant's counsel that even if the second renewal affidavit was too late the mortgage cannot be attacked by appellee standing in the shoes of the execution creditors, because the second renewal affidavit was filed before the entry of judgments, counsel cites and relies upon cases which have been disapproved, condemned or reversed. These cases are all contained on page 34 of his brief.

The case of *Re New York Economical Printing Co., Bankrupt*, 49 C. C. A., 133, Circuit Court of Appeals, 2d Circuit, treats and disposes of this and other points involved and we therefore call the attention of the court to the following excerpt therefrom (pp. 133-134):

> "According to the settled construction of the chattel mortgage statute by the decisions of the New York courts, the provisions in respect to filing must be strictly followed. Compliance stands as a substitute for immediate delivery and an actual and continued change of possession of the mortgaged property, and repels the conclusive presumption of fraud which would

otherwise infect the transfer. The effect of non-compliance is to nullify the mortgage as against all creditors of the mortgagor whose debts arise while the property remains in his possession, whether these debts originated previous to or after the default, and whether with or without notice of the existence of the mortgage at the time of giving credit. A default in complying with the requirements of the statute is not cured by any subsequent act of attempted compliance, and although the departure has been rectified in all respects save as to the time within which the act is required to be done a creditor who afterwards obtains a judgment can subject the property to his execution as though a mortgage had never existed. By the peremptory language of the statute the mortgage ceases to be valid by failure to comply with the requirements. It cannot, therefore, be revived except by some act of the parties which is equivalent to the making of a new transfer of the chattels —such as a surrender and redelivery of the instrument, or a surrender of the possession of the chattels in satisfaction or as a further security of the debt; but no act of the mortgagee alone would be effective. These propositions are well settled by the judgments of the courts of last resort. *Thompson* v. *Van Vechten*, 27 N. Y., 568; *Karst* v. *Gane*, 136 N. Y., 316, 321; 32 N. E., 1073; *Tremaine* v. *Mortimer*, 128 N. Y., 1; 27 N. E., 1060; *Porter* v. *Parmley*, 52 N. W., 185; *Ely* v. *Carnley*, 19 N. Y., 496; *Dillingham* v. *Bolt*, 37 N. Y., 198; *Stephens* v. *Perrine*, 143 N. Y., 476; 39 N. E., 11. *In attempting to mitigate the supposed hardship of the statute when the question has arisen between the mortgagee and a creditor, with notice of the existence of the mortgage at the time the credit was given, some of the lower courts have given to it a more latitudinarian interpretation* (*Swift* v. *Hart*, 12 Barb., 530; *Nixon* v. *Stanley*, 33 Hun, 247;

Newell v. *Warner*, 44 Barb., 258); *but these decisions cannot be reconciled with its plain language, and are inconsistent with the opinions of the courts of last resort.* Adopting the construction placed upon the statute by the highest courts of the state, it is manifest that at all times after August 1, 1896, the date of the expiration of one year from the filing of the mortgage, any creditor of the mortgagor was entitled to treat the lien as void upon obtaining a judgment and execution. The omission to file a copy during the 30 days preceding August 1, 1896, was a fatal departure from the statute. So, also, was the omission to file during July, 1897, a statement showing the time and place of the original filing of the mortgage. The statute then in force made the filing of this statement essential. It has been decided in *Stevenson Brewing Co.* v. *Eastern Brewing Co.*, 22 App. Div., 524; 48 N. Y. Supp., 89, and *McCrea* v. *Hopper*, 35 App. Div., 572; 55 N. Y. Supp., 136, that the refiling of a copy of the mortgage with the dates of filing and refiling indorsed thereon, together with a statement showing the amount then due, does not satisfy the statute as amended in 1896. The attempts to comply with the statute doubtless operated as notice of the continuing existence of the mortgage to such creditors as may have examined the records of the office, but they could have no other effect. They were not intended to revive a defunct mortgage, and, if they had been, would have been unavailing for that purpose."

The court will note that the cases of *Swift* v. *Hart*, *Nixon* v. *Stanley* and *Newell* v. *Warner*, cited by counsel in his brief, have been according to the decisions from which we just cited condemned and disapproved, but the case of *Newell* v. *Warner*, 44th Barber, 258, was reversed by the New York Court of

Appeals in 44th New York, 244. Counsel cites these cases in order to show, among other things, that under the New York statute successive renewals were tolerated, but the case of *Newell* v. *Warner*, in the 44th New York, disapproves the view and holds that under the New York statutes as then in force but one renewal was necessary, and further successive renewals were not required; that upon the refiling of the mortgage the lien would be good until the maturity of the indebtedness; therefore, if the construction placed upon the New York statute, as it existed in 1883, by the court of last resort of that state should apply to the Illinois statute, under that statute successive renewals are not required, but after one renewal the lien of the chattel mortgage is good for all time, or at least until the maturity of the debt, whenever that may be. This would be reducing counsel's contention to an absurdity.

In 1863 the New York statute was amended by expressly providing for annual renewals.

The extract printed from the *re New York Economical Printing Company* is important because it bears upon many of the points discussed on this appeal. It is true that on other points involved in the appeal the same Circuit Court of Appeals subsequently modified its opinion in that case, but not in regard to the law as contained in the foregoing extract. We might cite other cases going to show that the earlier cases cited by appellant have been disapproved, but as shown by the quotation in that case the law in New York now is that once a chattel mortgage is void for failure to comply with the requirements concerning filing or renewals, the

mortgage is void forever, and the only way the lien can be re-established is by executing and filing a new mortgage.

Counsel has pointed to no decisions in Illinois sustaining his theories in the case. In further illustration of our conclusion that in Illinois the statutes concerning the liens of chattel mortgage are very strictly construed, we refer to the line of authorities holding that where a chattel mortgage is once due a delay, even for three days, in foreclosing will render the lien of the mortgage void.

> *E. G. Richley* v. *Childs*, 114 Ill. App., 173-176, and cases cited in the opinion.

There is a dearth of authorities in Illinois upon the question of re-filing and the effect of failure to re-file in apt time, but the points raised by counsel's brief have been treated not only in the text books but in the cases arising in other states. In Jones on Chattel Mortgages, 5th Edition, at page 287, the author says:

> "A re-filing of a mortgage must be effected within the time limited for that purpose. It is nugatory if done either before or after that time. A re-filing after that time is not effectual to revive and continue the validity of the mortgage for a year after such re-filing. In case the last day for the re-filing of the mortgage falls on Sunday, the mortgage must be re-filed on or before the Saturday previous. A re-filing after the expiration of the time limited is not equivalent to the filing of a new mortgage or to the original filing of the mortgage. If the re-filing be not done in strict compliance with the statute, the mortgage becomes void as against creditors, purchasers, and *bona fide*

> creditors and can not be revived. * * * The re-filing required by law must be done within thirty days next preceding the expiration of the year. A re-filing before the commencement of the thirty days is unavailing. Such a mortgage will be postponed to the claims of subsequent creditors. *A chattel mortgage which has ceased to be valid by a failure to file it as required by law cannot be revived by any act of the parties so as to give it priority over other liens.*"

Appellant, in support of his theory that the time within which a second renewal affidavit may be filed runs not from the time the first renewal affidavit was filed, but from the last day of the period in which he could have filed his first renewal affidavit, cites no authority, refers to no principle of law. The only discussion on this point vouchsafed by him is contained at page 33 of his brief, where he says:

> "If the section is construed to mean from the day of the date, then naturally it puts a premium on delay and procrastination. If it means from the period of filing, then the second affidavit in this case was filed on time."

This precise point has been passed upon and adversely to appellant's theory in the following cases:

> *Seaman* v. *Eager*, 16 Ohio State Reports, 209.
>
> *Briggs* v. *Mette*, 42 Michigan, 12.
>
> *Nitche* v. *Townsend*, 4 N. Y. Supreme Court, 299.
>
> *Day* v. *Munson*, 4 Ohio State Reports, 488.

In *Seaman* v. *Eager*, *supra*, it appears that the chattel mortgage was dated and filed August 16,

1860. It was subsequently re-filed under the statute on July 29, 1861, at half past 8 o'clock A. M. On July 29, 1862, at 9 o'clock A. M., the property was levied upon by the defendant, a constable. The court held that the time for filing the second renewal affidavit referred to the time when the first renewal affidavit was filed, and not to the time when the original mortgage was filed. This is decisive of appellant's contention that he had a right to regard as the time for filing the renewal affidavit, not the time when the renewal affidavit was filed, but within the thirty days' period in which the appellant could have filed the renewal affidavit.

In the *Eager* case so strictly did the court construe the statute that it regarded the fraction of a day, and held that because the re-filing did not take place before half past 8 o'clock A. M. (the original having been filed at that hour the year previous) the chattel mortgage was not considered renewed within the purview of the statute. We might remark in passing that on account of the peculiar wording of the Ohio statute it was so construed as to provide for and allow successive renewals, but an examination of the case will show a wide divergence between the language of the Ohio statute and that of the Illinois statute under discussion.

In *Nitchie* v. *Townsend*, 4 N. Y. Sup. Court Reports, 299, the court, in construing the chattel mortgage law of New York State as it existed at the time of rendering its decision, holds:

> "We think that in order to preserve the lien of the mortgage it is necessary to file a new copy within thirty days preceding the expiration of

the first year, and so on from year to year, if the mortgagor wishes to continue the lien. Every copy thus filed must be recorded as a new mortgage. It being necessary to file copies every successive year, we are also of the opinion that the copy filed on the 18th of June, 1847, at fifty minutes past 10 o'clock, ceased to be valid as a lien against creditors in one year from that time, and, although the 18th of June was Sunday, the day must be computed. *The day of filing the copy does not relate back to the day of filing the original mortgage.*"

This is a direct answer to and a refutation of appellant's contention that in regard to the time of filing the second renewal affidavit, if he had the right to file a second renewal affidavit, the day of filing the second renewal affidavit relates back not to the time of filing the first renewal affidavit, but to the time of filing the original mortgage.

The contention that renewal affidavits are contemplated by the statute because in Section 5 of the statute which follows that portion of the act providing for the filing of the mortgage and of a renewal affidavit uses the plural instead of the singular, in hardly worthy of discussion. A reading of Section 4 of the act shows that in the renewal affidavit both the mortgagor and the mortgagee must join. This does not necessarily mean that they must both sign and swear to the same paper. That may be done by different affidavits.

Gregg v. *Sandford*, 24 Ill., 17.
Webster v. *Nichols*, 104 Ill., 160-177.

APPELLANT WAS NOT ENTITLED TO NOTICE OF THE APPLICATION FOR THE ORDER OF SUBROGATION, AND IS NOT, THEREFORE, IN A POSITION TO COMPLAIN THAT THE COURT ERRED IN STRIKING OUT HIS ANSWER TO THE PETITION FOR THE ORDER, OR THAT THE REFEREE COMMITTED AN ABUSE OF DISCRETION IN GRANTING THE ORDER.

A great part of appellant's brief is devoted to a discussion of the alleged error of the Referee in allowing the order of subrogation upon the petition of appellee to have the lien of the judgments and executions shown in the record preserved for the benefit of the bankrupt estate and to have appellee subrogated to the liens of the executions. This order of subrogation was entered after the Referee had sustained appellee's objections to appellant's answer to this petition. Appellee relies for reversal upon the facts set forth in the answer so stricken out. An all-sufficient answer to appellant's argument based upon this alleged error in striking out appellant's answer and in granting the petition for subrogation, is that appellant, *not being entitled to notice of the proceeding for subrogation*, was consequently not entitled to file an answer thereto. Nor is he for that reason in a position to claim that the Referee committed an abuse of legal discretion in granting the order. Appellant, so far as the petition for subrogation and the proceedings thereunder were concerned, and until appellee under and by virtue of the rights conferred upon him by the order of subrogation, had attacked the validity of appellant's mortgage, had absolutely no standing in court, being entitled neither to notice, nor to the privilege of an-

swering the petition. In spite of some few vague and unsatisfactory authorities relied upon by appellant, the law undoubtedly is, as expounded by the Circuit Court of Appeals for the Seventh Circuit and by this court, that in a proceeding instituted by the Trustee to be subrogated, under the provisions of 67 f of the Bankruptcy Act to have judgments and executions, which would otherwise be void, kept alive for the benefit of the bankrupt estate, the party, whose interests are to be attacked under cover of these liens so preserved is not a party to the proceeding and is not entitled to notice. This has been held by that court in the case of *Reardon* v. *Rock Island Plow Company*, 168 Fed. Rep., 654, and by the Supreme Court in the same case on appeal from this court in 222 U. S., 354.

From the case as reported we glean the following facts:

Plaintiff, a Trustee in bankruptcy, filed a bill against the defendant to recover certain property which, before the institution of bankruptcy proceedings, had been transferred to the bankrupt by the defendant Rock Island Plow Company and afterwards surrendered to defendant. The amended bill alleged, among other things, that before the institution of bankruptcy proceedings two executions against the property of the bankrupt had been issued and were in the hands of the Sheriff; that the Trustee, seeking to avail himself of the provisions of Sec. 67, Pars. e & f, of the Bankruptcy Act, had filed with the Referee a petition setting forth the entry of the judgments; the issuing of the executions thereon and the fact that they constituted liens

on the property of the bankrupt from the date of their receipt by the Sheriff, and praying that the liens of the executions might be declared null and void as to the judgment creditors, but might be preserved for the benefit of the estate in bankruptcy. The judgment creditors entered their appearance in the subrogation proceedings and consented that the prayer of the petition be granted, but the defendant, as appears by his plea, received no notice of this proceeding for subrogation and did not appear therein. An order was entered by the Referee granting the relief prayed for in the petition. Three days after the entry of the subrogation order, the Trustee filed his bill of complaint in the District Court wherein he assailed the transactions between the defendant and the bankrupt, based upon the conditional sale of property by the defendant to the bankrupt. In the suit the Trustee, relying upon the liens of the executions to which he had been subrogated, asked the court to decree a surrender of the property to the Trustee or the payment of its value. To this bill the defendant filed its plea, wherein one of the defenses urged by the defendant was the invalidity of the order of subrogation, *because the order of subrogation was entered without notice to the defendant.* There is no statement of the facts in the case as reported in the 168 Fed. Rep., but in the report of the same case in 22 American Bankruptcy Reports, at page 28, we find this statement: "The plea also states that no levy was made by the Sheriff upon any of the goods; *that the alleged order of subrogation in favor of the Trustee was illegal and void and* MADE WITHOUT NOTICE TO APPELLEE." Mr. Justice White, who delivered the

opinion of this court affirming this case, in his statement of the facts wrote: "In a plea to the amended bill * * * *want of notice of the subrogation proceedings and the consequent invalidity of the order of subrogation was also averred.*" (222 U. S., 354-357.) The cause was heard in the District Court upon the sufficiency of the defendant's plea, alleging, as we have shown, among other things, the invalidity of the order of subrogation through lack of notice to the defendant, and the plea was held sufficient by the District Court. The Trustee electing not to file a reply to the plea a decree was thereupon entered dismissing the bill. On appeal to this court the decree of dismissal was reversed, this court holding that the matters set up in the plea did not, as to any of the defenses urged therein constitute a defense to the Trustee's bill of complaint, and directed the District Court to overrule defendant's plea. As to the defense set up in the plea urging the invalidity of the order of subrogation for lack of notice to the defendant the Circuit Court of Appeals held:

> "The Bankruptcy Act provides (Sec. 67b, c, f) for the preservation of liens in favor of the estate, when obtained by any creditor of the bankrupt, through legal proceedings or otherwise, and set aside in bankruptcy, with the Trustee subrogated therein for their enforcement; and the effect of this provision, in reference to an order in bankruptcy so preserving a lien obtained in legal proceedings, is not open to question (*First National Bank* v. *Staake*, 202 U. S., 141, 146, 148; 15 Am. B. R., 639; 26 Sup. Ct., 580; 50 L. Ed., 967) as rendering it inoperative as a preference, while the statute recognizes its force otherwise, but 'distributes the lien among the whole body

> of the creditors,' in conformity with the policy of the act. The executions described in the bill were issued in favor of judgment creditors of the bankrupt and in the hands of the Sheriff for levy; and when bankruptcy intervened, liens being claimed, the court made this statutory order, on notice to the claimants—*the only notice, as we believe, intended by the provision*—so that the Trustee became subrogated to any lien obtained by such creditors, as of the date of the adjudication of bankruptcy."

Reference to the context shows that by the word "claimants" the court meant the execution creditors.

The plea set forth as above shown that the order was entered "without notice to appellee." The appellee was the defendant Rock Island Plow Company.

This court affirmed in all respects the judgment of the lower court, and it is now the well-settled law that in proceedings for subrogation under 67f of the Bankruptcy Act the notice contemplated to be given need not be given to the party against whom the lien of an execution is sought to be asserted.

So in *Re Merrow*, 131 Fed. Rep., 393 (U. S. Dist. Ct., Mass.), the trustee was subrogated to the rights of attaching creditors in order to enable him to bring into the estate certain real estate which he could not do unless under cover of the attachment liens. The attaching creditor consented to the order of subrogation.

From a reading of the opinion in the case it appears that the claimant to the real estate under an unrecorded deed appealed from the order of sub-

rogation, and it was held that he was not a party to the proceeding, Judge Lowell saying:

> "It seems that this land would not have passed to an assignee in insolvency under the state law (citing cases). And it may not have passed to the trustee in bankruptcy (citing cases). *The question does not arise here* where the title is not in controversy. Here there were existing attachments apparently valid. The Bankrupt Act did not dissolve these except for the benefit of the estate. If they were valid as against Mrs. Merrow before bankruptcy as against her they were equally valid afterwards. The only controversy here possible concerning the rights arising thereunder (the attachments) *is between the attaching creditor and the trustee.* As both parties are agreed that the latter shall be subrogated to the rights of the former, the judgment of the Referee is affirmed."

It might be considered a work of supererogation for us, in the light of the authority upon the point of notice as expounded in the case of *Reardon* v. *Rock Island Plow Company* and in *Re Merrow* to further argue the question of necessity of notice, but we can safely say that even in absence of these authorities any other conclusion would be a *reductio ad absurdum.* The reason of the provision in the statute requiring notice to be given is, we take it, that the execution creditors should be kept informed of the Trustee's intention in the premises and warned not to interfere with the executions by withdrawing them or cancelling them, or by taking any steps which might tend to destroy or impair the liens of the executions.

The provisions of the act providing for the pres-

ervation of these liens, not being automatic, an order of court is requisite and the proper and only party to be notified is the execution creditor for the reasons above shown. No reason is apparent to us why notice should be given to the party whose interests it is proposed to attack behind the shield of these executions. Occasions may arise and can be easily imagined where it may be impossible, difficult or impolitic to give such notice to a person who may afterwards be sued. Suppose a Trustee in bankruptcy, upon assuming his office, should find that certain executions against the bankrupt had been issued within the four months' period, and, without having any definite transfer or transaction of the bankrupt in view, but merely as a matter of precaution, he should deem it proper to apply to the court to preserve these executions for the benefit of the estate and the court should grant the order of subrogation; that after such an order of subrogation had been entered the Trustee should for the first time receive information that certain transactions between the bankrupt and other parties, which would be immune against attack by the Trustee, had he not been so subrogated, could be assailed by him by virtue of the rights vested in him under the order of subrogation. Suppose, again, that the Trustee, having in mind a particular transaction or transfer, should on petition be subrogated to the execution liens, and he afterwards discovered other transactions obnoxious to execution liens but invulnerable otherwise. Could it be contended that in such cases the Trustee could only attack transfers which he had in contemplation when he came so subrogated and that the other par-

ties could defend suits brought against them to set aside the transactions in which they were involved, because they had not received notice of the proceedings for subrogation? If appellant's theory should prevail, although an order of subrogation had been entered with no particular object of attack in view, or with one particular object of attack in view, every such attack upon a transaction or transfer not named or contemplated would require as a condition precedent a fresh application for subrogation upon notice to the party whose interests are sought to be jeopardized.

Now, as we have shown, appellee's petition for subrogation did not mention any particular transfer, and in no way, directly or indirectly, referred to appellant's chattel mortgage. True, the petition merely refers in a general way to "certain transfers" and "conveyances" (without specifying them) which the Trustee intended to attack. *Non constat* but that the Trustee had in view not only appellant's mortgage but other mortgages or voidable transfers. There is in fact nothing in the record to show that the Trustee did not have in mind other transfers or liens. If indeed he had such a thing in view, could appellant have objected, or should the Referee have granted the petition and in the order limited the scope of the Trustee's attack to these other transactions? As a matter of fact, no names were mentioned in the petition. Thus it appears that neither directly nor indirectly was appellee nominally or actually a party to the proceeding for subrogation. Therefore appellant was not called upon or in a position to file an answer to the petition.

Having thus demonstrated that appellant was not entitled to notice of proceedings culminating in the order of subrogation, the irresistible conclusions flow that appellant was not a party to these proceedings, was not entitled to answer the petition for subrogation, the answer was improperly filed, the action of the Referee in striking out the answer cannot be questioned, and error cannot be predicated thereon.

It follows, also, as a logical consequence, that the matters contained in the answer are not properly before this court, and unless these matters are contained elsewhere in the record, cannot be made the subject of discussion on this appeal.

We have thus dwelt at length upon the question of practice, *i. e.*, the right of appellant to file his answer to the petition in subrogation because once it is decided that the answer was improperly filed and should not be regarded there is little left of appellant's plaint that the Referee committed an abuse of discretion in preserving the liens of the execution and in subrogating the appellant as Trustee to such liens.

THE COURT BELOW DID NOT COMMIT AN ABUSE OF DISCRETION IN GRANTING THE ORDER SUBROGATING APPELLEE TO THE LIENS OF THE EXECUTION CREDITORS. IT IS THE POLICY OF THE BANKRUPTCY ACT TO ALLOW THE TRUSTEE TO BE SUBROGATED UNDER SECTION 67f FOR THE PURPOSE OF ATTACKING UNLAWFUL LIENS. APPELLANT'S LIEN WAS UNLAWFUL, AND THEREFORE SUBJECT TO ATTACK UNDER THE ORDER OF SUBROGATION.

Again assuming, for the purpose of this argument, that the matters presented by appellant's answer are now properly before this court for consideration, and that the Referee was called upon to act upon the matters set forth in the answer, we maintain that, even if those matters set forth were true, the Referee did not commit an abuse of discretion in granting the order of subrogation. We cannot bring ourselves to believe that appellant is serious in arguing that the Referee in ruling as he did so abused his discretion. Indeed, this claim of abuse of discretion smacks of the ludicrous. There can be no claim or pretense that appellant's mortgage is good as against creditors armed with process, or that it is not void as to the judgments and executions shown in the record. If bankruptcy proceedings had not intervened the Sheriff could have levied and would be obliged under the executions to levy upon all the property of the Tengwall Company and in total disregard of appellant's mortgage.

Whether or not the judgments were entered on confession at the instigation of the Tengwall Company and for the purpose of giving the plaintiffs a vantage point of attack upon the validity of appellant's mortgage, this did not lessen or impair the effect of the judgments or of the liens of the executions issued thereon. They and the executions were immune from attack by appellant. From the moment the executions were issued to the Sheriff they became liens upon the property secured by appellant's mortgage, and were it not for these bankruptcy proceedings appellant would be powerless, if the mortgage was void, to prevent a seizure and sale of the

property by the Sheriff. But bankruptcy proceedings *did* intervene and these executions *eo instanti* became inert and but for the order of subrogation would have become null and void, in which event appellant might claim that his mortgage, theretofore void, revived, flying for sanctuary to that part of Section 67f which avoids liens obtained by legal proceedings, but supplicating the court to blind its eyes to and disregard the other part of the same section, which, undoubtedly enacted to apply to just such contingencies as here exist, provides for the preservation of the liens for the benefit not of the judgment creditors, but of the general body of the bankrupt's creditors. Appellant is striving on this appeal to induce the court to give him a much better position in regard to his mortgage than if there had been no bankruptcy. He is availing himself of the bankruptcy proceedings to make good that which otherwise would be void. By what species of reasoning appellant arrives at the conclusion that he can thus benefit by the bankruptcy proceedings we fail to comprehend. Why should the bankruptcy place appellant in a better position than he would occupy in absence of these proceedings? Appellant is seeking to enjoy a unique advantage arising out of the bankruptcy and is seeking to reap the benefit of a proceeding the main purpose of which is to divide an insolvent's estate *pro rata* and without favoritism among his creditors.

Appellant has repeatedly dwelt upon the inequity of the situation. It would be in the highest degree

inequitable to allow appellant to take the advantage of his anomalous proposition.

By reason of appellant's failure to comply with the statutory requirements concerning the execution and recording of chattel mortgages, he has placed himself outside the pale of the law; he has no particular rights in the mortgaged property which anybody is bound to respect, except the bankrupt. But appellant treats of this matter as if he actually had rights which everybody, including the trustee in bankruptcy, was bound to regard. Chattel mortgages are creatures of the statutes. The privileges accorded the chattel mortgagee are vouchsafed to him only upon a strict compliance with the statutory requirements. The mortgagee makes a bargain wherein it stipulated that if he shall comply with certain conditions precedent and subsequent he shall not be amenable to the effects of the general rule of law that change of title of personal property, without change of possession, is presumed to be fraudulent. As stated in *Frank* v. *Miner*, 50 Ill., 440-447:

> "At the common law all sales and pledges of personal property were void unless the possession accompanied and went with the title or to the pledgee; and where a vendor or pledgor retained the possession that transaction was held to be fraudulent *per se* and incapable of explanation. But our Legislature has altered the common law insofar as to permit the mortgagor to retain possession of the mortgaged property where it is provided in the instrument itself, when properly executed and acknowledged and by having a proper entry made by the Justice of the Peace in his docket, and by having it duly recorded. But since the adoption of the act this

court has uniformly held that if either of these requirements is wanting, while the mortgage is binding between the parties, it is void as to creditors and purchasers. See *Porter* v. *Dement*, 35 Ill., 479, and cases therein cited."

As stated by another authority:

"Compliance stands as a substitute for immediate delivery and actual and continual change of possession of the mortgaged property and repels the conclusive presumption of fraud which would otherwise infect the transfer. The effect of non-compliance is to nullify the mortgage as against all creditors of the mortgagor whose debts arise while the property remains in his possession, whether these debts originated previous to or after the default, and whether with or without notice of the existence of the mortgage at the time of giving credit."

In re N. Y. Econ. Pl. Co., 49 C. C. A., 134, 135.

It is elementary law that a failure to comply with the statutory requirements renders this mortgage void, even as to parties who have actual knowledge of the existence of the mortgage (*Frank* v. *Miner*, *supra*), and not only is such a mortgage void under similar circumstances in a court of law, but in a court of equity. Again we ask, where is the inequity of allowing appellant's mortgage to be attacked and declared void?

Appellant's counsel dwells with great insistence upon his contention that the spirit of the Bankruptcy Act does not lead to the destruction of lawful liens. (Brief, page 20 *et seq.*) This may be granted, but in stating this appellant is begging the question. Appellant's lien was not a lawful one, or, at best, was

lawful only between himself and the bankrupt before the issuing of the execution and before the filing of the petition of bankruptcy.

By the expression "lawful liens" in bankruptcy is meant liens good not only against the bankrupt but also against all his creditors. In support of this we quote the language of Mr. Justice Peckham in *Security Warehousing Co.* v. *Hand*, 206 U. S., 424-425:

> "The fact that if there had been a creditor of the bankrupt of the class mentioned who had obtained a specific lien on the property prior to the adjudication in bankruptcy, the trustee could in that case have enforced the same, did not make any difference because no such thing had been done when the adjudication in bankruptcy was made. This court had theretofore approved the remark *in re New York Economical Printing Co.*, 6 A. B. R., 615; 49 C. C. A., 133; 110 Fed., 514-518, that the present Bankrupt Act contemplates that a lien good as against the bankrupt and all of his creditors at the time of the filing of the petition in bankruptcy should remain undisturbed."

Note the expression "a lien good as against the bankrupt and all of his creditors."

In *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, at page 302, the court quotes with approval the following language from *New York Economical Printing Co.* case, *supra:*

> "The Bankrupt Act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present Act, like all preceding bankrupt acts, contemplates that a lien good

at that time as against the debtor and *against all of his creditors* should remain undisturbed. *If it is one that has been obtained in contravention of some provision of the act which is fraudulent as to creditors or invalid as to creditors for want of record, it is invalid as to the trustee.*"

In connection with that portion of the opinion italicized we call the court's attention to the case of *Blatchford* v. *Burden*, 122 Ill., 657, holding in express terms that in Illinois it is the law that under the statutes the recording of a chattel mortgage is as essential to its validity as against third persons as any other element entering into the making of a valid chattel mortgage; that it is valid only from the time of its being filed for record *even as against purchasers and creditors with actual notice;* that as against third persons, creditors or purchasers, the lien of a chattel mortgage can be preserved in only two ways; by the mortgagee taking and retaining possession of the property, or if the mortgagor is to retain possession, then by the recording of the properly executed and acknowledged chattel mortgage providing for such possession; that the liens of an execution in the hands of an officer attaches to all property which the debtor may own or which he may acquire during the life of the execution; that if, therefore, goods and chattels became the property of an execution debtor by sale and delivery to him without the preservation of a lien for the purchase money in the form prescribed by the statute, the execution lien immediately attaches.

Blatchford v. *Burden*, 122 Ill., 657.

The theory of the law is that all transfers or conveyances of personal property without change of possession is, except as between the parties, constructively fraudulent. Thus in *Stevenson* v. *Browning*, 48 Ill., 79 at page 80, the court says:

> "The mortgage not having been recorded and not being properly acknowledged, while it is binding between the parties, *it was in law fraudulent as to creditors* and *bona fide* purchasers. The lien of the execution then attached on the day it issued. * * * This lien was superior to that of the mortgage and must hold the property unless it has been waived or released."

Clearly therefore, according to the Illinois authorities, appellant's mortgage being in contravention of the statute, was fraudulent as to creditors, especially the execution creditors of appellant for want of record, and is invalid as to appellees. It by no means is a lawful lien, and not only is it *not* the spirit of the Bankruptcy Act to uphold the lien claimed by appellant, but its policy to destroy it. The courts have time and again declared that the intent and policy of the Bankruptcy Act is to dissolve a lien where its retention would not benefit the general body of the bankrupt's creditors, and to preserve liens when the preservation will benefit the general body of the bankrupt's creditors. The very purpose of the enactment of that part of Section 67f providing for the preservation of liens, which otherwise would be nullified, is to put the Trustee in a position to attack a transaction which but for that provision he would be powerless to do. That this is the policy of the Act is made clear by other

provisions of the Bankruptcy Act. For instance, Section 67e of the Act provides:

> "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon *mesne* process or a judgment by confession which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved. * * * *If the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien*, and empowered to perfect and enforce the same in his name as trustee, with like force and effect as such holder might have done had not bankruptcy proceedings intervened'."

Despite the controversy that has arisen as to whether Section 67e has been declared inoperative because repugnant to the provisions of the later Section 67f (the Circuit Court of Appeals for the Seventh Circuit holding that the former section has been repealed by implication and other courts holding that it is not inconsistent therewith), nevertheless its presence in the act as passed shows what was the intent of Congress as to the policy of the Bankruptcy Act, and this policy, as thus evidenced, is that wherever the avoiding of a lien, obtained by judgment or otherwise, would militate against the best interests of the creditors, such lien shall not be nullified. The policy of Congress in enacting the Bankruptcy Act is further evidenced by the last amend-

ment to Section 47a of the Act, by which amendment it is provided that:

> "Trustees in bankruptcy as to all property in the custody or coming into the custody of the Bankruptcy Court, shall be deemed vested with all the rights, remedies and powers of a creditor holding any lien by legal or equitable proceedings thereon; and as to all property not in the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

This amendment became effective July 1, 1910, but had passed both houses of Congress before the judgments in question had been entered. So at this time it is the policy of the Act that the Trustee should be subrogated to the judgments in question and it is not now considered inequitable that the Trustee in bankruptcy should for the benefit of the general creditor have the right to have declared void just such transactions as are here attacked. But appellant argues that what was equitable on July 1, 1910, was inequitable on June 4, 1910.

The case of *First National Bank of Baltimore* v. *Staake*, 202 U. S., 141, cited by appellant in his brief, is in reality an authority in our favor, showing as it does the views of this court respecting the intent and policy of Congress in enacting the provisions of 67f. This case is peculiarly appropriate, because the steps taken by the Trustee in the case at bar by way of subrogation were fashioned after the method of procedure set forth and approved in that case. In both cases transfers which might have been good between the parties were absolutely void as against

execution creditors. In the *Staake* case a contract for the sale of real estate had been executed, the consideration paid, the parties were in possession, but no deed transferring the property was made until after several attachments were sued out against the grantor, after which the deed was recorded. Within four months after these attachments were levied the grantor of the real estate was adjudicated a bankrupt, and the Trustee, taking advantage of the provisions of 67f became by order subrogated to the right of these attachment creditors and was allowed by the court to enforce these judgment liens for the benefit of the bankrupt's estate. Mr. Justice Brown, who wrote the opinion, on this point, says (p. 146):

> "The first provision contemplates the attachment of property to which the bankrupt has the complete, legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, *a purchaser under an unrecorded deed*, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors by reason of the fact that the attachment was dissolved as a prefer-

ential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy. * * *

"To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress. It might have validated all such liens, even though obtained the day before proceedings were instituted. It might probably have invalidated all such liens whenever obtained. It took a middle course, and invalidated all liens obtained through legal proceedings within four months prior to the filing of the petition, but at the same time preserved to the general body of creditors, as against third parties (such as purchasers under an unrecorded deed), such liens as attaching creditors had secured upon property which would have passed to the subsequent purchaser in case the attachment had not been levied. It is true that the attaching creditors are thereby deprived of the fruits of their diligence, but the same thing would have happened had the attachment been levied upon property to which the bankrupt had the whole and undisputed title, or of which he had made a fraudulent conveyance. As remarked by the District Judge, 'In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the *pro rata* benefit of all the creditors.'

"*Section 67f is merely carrying out the general purposes of the act, of securing to the creditors the entire property of the bankrupt, reckoning as part of such property liens obtained by attaching creditors against real estate which had been transferred to another, though no deed had been actually executed and recorded.*"

This shows as plainly as words can indicate what

was the purpose and spirit of Section 67f, and it brings out in strong relief the fact that no matter what might be the equities between the original parties to the conveyance sought to be attacked by means of the subrogation, the purpose of the act, nevertheless, was to do away with these equities. In the *Staake* case the equities between the original parties to the deed were as strong as could be imagined. The facts in this case have already been stated; nevertheless, with all the strong equities existing in favor of the grantee, the courts sanctioned with approval the action of the trustee in procuring the order of subrogation and in subjecting the property to the payment of the debts of the general creditors of the bankrupt. Compare the equities between the parties in that case and the equities of the appellant in this case.

So, in *Receivers, etc.*, v. *Staake*, 133 Fed., 718, which is the title in the Circuit Court of Appeals, Fourth Circuit, of the case of *First National Bank of Baltimore* v. *Staake*, *supra*, the court after stating the facts and citing Section 67f said:

> "It cannot be disputed that the liens of the attachments in this case were obtained within four months by legal proceedings against a person who was insolvent and that the court has, on due notice, ordered that the right under the attachments shall be preserved for the benefit of the estate, and passed to and be preserved by the trustee for the benefit of the estate. There is therefore in the facts of this case a literal gratification of the words of this section. * * * A primary object of the bankrupt law is to prevent preferences and compel equality among creditors of the bankrupt, and there can be no

doubt that the sequestering of attachment liens, such as those in question in this case, for the benefit of the general creditors, does produce equality and prevent preferences. * * * (P. 719.)

"* * * * In the present case the sale by the bankrupt was void as against attaching creditors for want of a recorded deed. The property was levied upon by creditors, and, by virtue of the attachments, might have been sold under judicial process against the bankrupt. The levy was within four months of the filing of the petition in bankruptcy and under 67f the lien is preserved for the benefit of the estate. * * * *Quoad* the attaching creditor the law regards the property so attached as to that extent still remaining the property of the bankrupt, because of the want of a proper recorded evidence of transfer, and that it is because the law considers the furnace property to that extent as remaining the property of Baird that the attachments are liens at all. *We consider the language of 67f so mandatory and imperative* that we arrive at the conclusion that the ruling of the court below must be sustained." (P. 720.)

The bankruptcy reports are replete with cases wherein similar transactions have been set aside, including conditional sales and defective chattel mortgages. In every one of these cases the equities between the original parties to the transaction were strong, much stronger in fact than in the transaction in question, and still appellant has the temerity to accuse the Referee of abuse of discretion and of allowing inequity to be accomplished, because the Referee allowed that to be done which the letter and the spirit of the act authorized, and which was sanctioned

by numerous cases referred to. In order to show what the courts have considered to be the intent and policy of the act in cases similar to the one at bar, we cite the following:

In the case of *Reardon* v. *Rock Island Plow Company, supra*, the Circuit Court of Appeals said:

> "The Bankruptcy Act provides, Section 67bef, for the preservation of liens in favor of the estate when obtained by any creditor of the bankrupt through legal proceedings or otherwise and set aside in bankruptcy with the trustees subrogated therein for their enforcement, and the effect of this provision in reference to an order in bankruptcy so preserving a lien obtained in legal proceedings is not open to question (*First National Bank* v. *Staake*, 202 U. S., 141), as rendering it inoperative as a preference where the statute recognizes its force otherwise, but distributes the lien among the whole body of the creditors *in conformity with the policy of the Act.*"

In re Baird, 126 Fed. Rep., 845 (District Court Va.), the court says:

> "The power of the court *and indeed its duty* to take away from the attaching creditors the benefit of the liens and give it to the trustee is found specifically in 67f."

In *Watschke* v. *Thompson*, 7 A. B. R., 504, the Supreme Court of Minnesota says (page 505):

> "The adjudication of bankruptcy had the effect of dissolving the attachment against the property of the bankrupt and restoring the title of the property to the estate. When the trustee received his appointment on November 29 there was one of two courses open to him: to accept the result of the dissolution and pursue

> the property wherever it might be, or, upon due notice, to obtain an order preserving the benefit of the attachment, if for any purpose the interests of the estate would thereby be best served."

In re New York Econ. Printing Co., 49 C. C. A., at page 137, the court says:

> "If a creditor by an execution or a creditor's bill has secured a legal or equitable lien upon the mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceedings, his lien would inure to his own exclusive benefit, but if acquired any time within the four months, it would be null and void under subdivision F of the section, except as provided in that subdivision and in subdivision B."

In re Beede, 14 A. B. R., 697 (District Court, N. Y.), the court went so far as to allow creditors to proceed to judgment and execution *after* the institution of bankruptcy proceedings in order to put these creditors in a position to attack a chattel mortgage, and thereupon to allow the trustee to be subrogated to the rights of these creditors. The mortgage in that case was not filed in the required time. The court (p. 711) held:

> "I have no doubt that the provisions of Sections 67a and 67b apply to the case of judgments obtained by the creditors of bankrupt after adjudication, the same as in the case of judgments obtained before. While it is the policy of the Bankrupt Act to leave all valid liens ob-

tained more than four months prior to the filing of the petition untouched, it is not its policy or effect to validate for the benefit of one creditor the instrument purporting to create a lien on the property of the bankrupt, declared to be void, in the interest of all unsecured creditors, because of the omission of the creditors asserting a lien to comply with the provisions of the law. The lien of the mortgage as against the estate of the bankrupt is good; that is, it will take the property from all creditors and apply it to the satisfaction in whole or in part of the debt of the mortgagee, and thus deprive the creditors of their rights to assert the invalidity of such mortgage for non-filing. If the creditors obtaining judgment are allowed to take the property from the mortgagee for their sole benefit, liens or in fact preferences obtained in four months are recognized in a way. Hence the provisions of subdivisions a and b of Section 67 of the Bankruptcy Act. *These provisions permit and demand the maintenance and enforcement of the rights of creditors to overthrow such secret liens void for non-filing, in the interest of the creditors.*"

In *First National Bank* v. *Guaranty Title & Trust Co.*, 178 Fed., 187 (Circuit Court of Appeals, Third Circuit), the court says at page 191:

> "It is not the intent of the Section (67) to dissolve a lien, where its retention will benefit the general body of the bankrupt's creditors."

And at page 192:

> "*The policy of the Bankruptcy Act is to preserve liens where the preservation will benefit the general body of the bankrupt's creditors.*"

While it may be true that the Referee under the terms of the Act has a discretion in regard to grant-

ing or refusing an order of subrogation, nevertheless, the exercise of this discretion does not depend upon the equities claimed by the person who is to be the subject of the attack under the subrogated liens. This we have already demonstrated by authorities which precede, and it is a corollary of the rule that such a person is not entitled to notice of the proceedings of subrogation. But we think we are justified in asserting that even if the matters presented in appellant's answer to the petition were properly before the Referee, the latter would have committed an abuse of discretion, if he had refused to grant the order of subrogation. We refer again to the dictum of the court in the case of *Receivers, etc.*, v. *Staacke* (*supra*), that the language of 67f is "mandatory and imperative."

The cases cited by appellant on the question of discretion do not apply or are not controlling.

In the case of *First National Bank* v. *Staake*, cited by appellant, the question as to whether or not the defendant was entitled to notice of the proceedings for subrogation did not arise, because, as appeared in the suit, he had made no objection, and the court declined to express an opinion as to his rights.

In the case of *Thompson* v. *Fairbanks*, 196 U. S., 516, cited on the same page of appellant's brief, it appeared that the District Court had refused to grant the order of subrogation, and the court properly held as a matter of course that Section 67f, requiring that an order of subrogation should be made as a condition precedent, and no such order having been made, the Trustee had no standing. Besides the facts in the case are not similar to those in the case

at bar. There the sole question was whether the taking possession by a mortgagee of after acquired property within the four months' period constituted a preference under the Act. The court held there was no preference.

In re Moore, 107 Fed., 234, cited at page 20 of counsel's brief, the District Court refused the order of subrogation because, as it is said in the language quoted on that page, "the spirit of the Bankruptcy Act does not lead to the destruction of lawful liens." We have shown, however, that the appellant in this case had no lawful lien. Contrasting this case with the *Staake* case passed upon by the Supreme Court, we see how utterly wrong the District Court in the *Moore* case was in making so broad a statement. The right of a purchaser of real estate in possession under an unrecorded deed is much stronger than the right of a mortgagee whose title as to the right of after acquired property is questioned. Nevertheless this court has held that a purchaser of property under an unrecorded deed is not safe from attack, and that the very object of Section 67f was to enable the trustee to be in a position to vacate and annul the rights of the purchaser of real estate occupying the same under an unrecorded deed.

Counsel has seen fit to attack the judgments as collusive. "Collusion" is an ugly word and means in general a secret arrangement or co-operation for a fraudulent purpose, and conveys the idea of a wrongful purpose for an unlawful object. This cannot be predicated of the action of the Tengwall Company and of certain of its creditors to enable the general body of creditors thereafter to take advan-

tage of a void or voidable transaction. No attack is or can be made upon the consideration upon which these judgments are based. The bankrupt owed the full amount of these judgments to the various judgment creditors; and even if bankruptcy proceedings had not intervened and the judgments were confessed solely for the purpose of enabling judgment creditors to take the advantage of a mortgage which as to all the world except the bankrupt was void, no charge of fraud or wrong could be lawfully laid at the doors of either the bankrupt or the judgment creditors.

Appellant's attack upon the legality of the Referee's order preserving the rights and liens of the judgments, including his arguments concerning the abuse of discretion, dormant executions and the like, is *fulmen brutum*, for the reason that under the recent ruling of the Circuit Court of Appeals for the Seventh Circuit in *Re Beckhaus*, 177 Fed., 141, the Trustee could have attacked the validity of appellant's chattel mortgage without resorting to the liens of the execution, and without the order of subrogation. In that case the court held that by the term "third person" in that portion of the Illinois statutes requiring the recording of a mortgage of chattels left in possession of the mortgagor as against the rights and interests of any third person, is included a simple contract creditor, that such simple contract creditor who has not obtained a judgment is just as much a stranger to the mortgage as is the simple contract creditor who has obtained a judgment; and that when it is declared by the courts that a fraudulent transfer is void only as to judgment

creditors the expression means merely that the creditor cannot seize the debtor's property until he has obtained some process which authorizes the seizure, also that where the recovery of a judgment becomes impossible it is not an indispensable requisite to enforcing the rights of the creditors that he should have recovered such judgment; and the court held therefore, as a logical conclusion, that where a chattel mortgage in Illinois is void as against creditors, the Trustee has a right to attack the same, even where the creditors have obtained no judgments or executions. The court, upon this point, in *Re Beckhaus, supra*, said:

> "Recording a mortgage of chattels left in the possession of the mortgagor is required 'as against the rights and interest of any third person.' The term 'third person' is broad enough to include everybody outside of the immediate parties to the instrument and their privies. A simple contract creditor who has not obtained a judgment is just as much a third person, is just as much a stranger to the mortgage, as is the simple contract creditor who has obtained a judgment. Both have the right to enforce payment, if that can be done. The interests of both are prejudiced if the debtor's property is covered by a fraudulent transfer. If at the time of the fraudulent transfer one creditor has obtained a judgment and the other has not, the only difference is that one has proceeded farther than the other in the enforcement of his rights and the protection of his interests. And when it is said that a fraudulent transfer is void only as to judgment creditors the expression means no more than that a creditor cannot seize his debtor's property until he has obtained some process which authorizes the seizure. As stated in *Skilton* v. *Codington*, 15 A. B. R., 810;

185 N. Y., 80; 77 N. E., 790; 113 A. S. R., 885:

"'The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of the creditor.'

"Our examination of the Illinois cases has led us to conclude that the Illinois courts have not decided, independently of procedure and having a regard solely to rights, that simple contract creditors, irrespective of the progress they may have made in suing their debtor, are not 'third persons' within the meaning and intent of the recording statute. Indeed, we think that the case of *Long* v. *Cockern* goes quite a way toward holding that they are. But at all events we consider that the question is open, and that we are therefore at liberty to adopt the construction we believe to be sound and righteous."

In the case of *Skilton* v. *Codington*, cited by the court in the *Beckhaus* case, it was distinctly held that the mortgagor's trustee in bankruptcy may attack a mortgage void for lack of filing, even without the assistance of a judgment or execution against the bankrupt, although, if the creditor seeks that relief in his own name, it will be necessary that his claim be first put in judgment. This being the law, it follows that the trustee, the appellee herein, was entitled to object to appellant's mortgage and to contest the same if it was invalid, even if there had been no judgments recovered, executions run, or no order of subrogation granted. Whether or not the appellee thought it necessary to take the step which it did for the preservation of the liens of the exe-

cutions out of excess of precaution, or whether at the time it was unaware of the decision in the *Beckhaus* case, or whether it thought it proper to take these steps and to fortify itself against all peradventure of attack, it is needless to argue. The fact remains that under the *Beckhaus* case it could have disregarded the provisions of that portion of 67f, referring to the preservation of execution liens.

Appellant to a great extent relies and bases a part of his argument upon matters of fact which he has set up in his answer to appellee's petition for subrogation. Appellee's exceptions to the answer, which were sustained by the court, perform the functions and were in the nature of a demurrer to appellant's answer. The court's action in striking out this answer is tantamount to sustaining the demurrer to the answer. This so-called demurrer having been sustained, appellant has no right to consider as in the case and argue the facts set forth in the answer. We found this assertion upon the well known principle that when a demurrer to a pleading is sustained, the facts alleged in the pleading demurred to are not in the case and are not the subject of consideration by the court. In support of this we cite *Anheuser-Busch Brewing Assn.* v. *Bond* (Cir. Ct. of Appeals, 8th Cir.), 66 Fed. Rep., 653; *Doolittle* v. *Selectmen of Branford*, 59 Conn., 402.

For the foregoing reasons we respectfully submit that the judgment appealed from should not be disturbed.

Herman Frank

Counsel for Appellee.

FALLOWS *v.* CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, TRUSTEE IN BANKRUPTCY OF TENGWALL COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 69. Argued November 9, 1914.—Decided November 30, 1914.

First National Bank v. *Staake*, 202 U. S. 141, and *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354, followed as to the purposes of § 67-f of the Bankruptcy Act of 1898 in subrogating the trustee to liens acquired by creditors on assets of the bankrupt within four months of the petitions.

Where the referee and both courts below have sustained the propriety of subrogating the trustees to liens and no abuse of the discretion vested in them is shown, this court accepts their action as correct.

The validity and priority of mortgage liens depend on the law of the State.

The statutes of Illinois relating to the continuation of a lien of a mortgage on personal property have not been definitely construed by the courts of that State; but this court sustains the construction of the District Court and the Circuit Court of Appeals holding that the lien of such a mortgage expires as against judgment creditors three years after record subject to one extension for twelve months on proceedings taken in strict conformity with the statute, and that attempts to further extend the lien are ineffective.

As between judgment creditors and the holder of a mortgage on personal property, *held* that as the lien of the mortgage had expired as to judgment creditors under the state law prior to the entry of the judgments, and under the state law could not be further extended, the lien of the judgments attached if not fraudulently obtained.

Executions delivered to the sheriff for service without any instructions to refrain from carrying out the mandate, *held*, under the circumstances of this case, to include levy.

In the absence of directions not to levy it is the duty of the officers to obey the directions and commands of the writ.

201 Fed. Rep. 82, affirmed.

THE facts, which involve the validity and priority of liens on property of the bankrupt of judgment creditors

and holders of notes secured by mortgage on personal property, and the construction of the laws of Illinois relating to such mortgages, are stated in the opinion.

Mr. Herman Frank for appellee.

Mr. Edwin H. Cassels for appellant, submitted:

Appellant's trust deed was invalid as against the bankrupt, and as against ordinary contract creditors, and had it not been for the entry of the order preserving the lien of the judgment creditors, and subrogating the appellee to all rights thereunder, this controversy would not have arisen. *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146; *Allcock* v. *Log*, 100 Ill. App. 573; *Stewart* v. *Platt*, 101 U. S. 731; Illinois Stat. Ann., 1913, par. 6755, p. 3687.

No liens on the property of the bankrupt were created by the judgments.

All statutes which create liens must be strictly construed and anything less than the delivery of an execution to the sheriff for the purpose of demand and levy cannot operate to create a lien in favor of a judgment creditor. *Gilmore* v. *Davis*, 84 Illinois, 487; *West. Un. Storage Co.* v. *Davis*, 64 Ill. App. 452; *Hawes* v. *Cameron*, 23 Fed. Rep. 327; *Smith* v. *Irwin*, 77 N. Y. 466; *Doyle* v. *Herod*, 9 Colo. App. 257; *Williams* v. *Mellor*, 12 Colorado, 1.

The validity of the liens claimed by the judgment creditors must be decided by the law of the State of Illinois. *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354.

"Serving" and "levying" mean entirely distinct and different things.

An execution must be held by the sheriff "for levy" in order to operate to create a lien upon the personal property of the judgment creditor. *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354; *Andrews* v. *Keep*, 38 Alabama, 315; *Waterman* v. *Merrill*, 4 Vroom, 378; *Kemble* v. *Harris*, 36 N. J. L. 526; *State* v. *Hamilton*, 16 N. J. L. 153; *Harris*

v. *Rankin*, 4 Manitoba, 115; *Wood* v. *Lowden*, 117 California, 232; *Cheston* v. *Gibbs*, 13 L. J. Exch. 53.

Peck v. *City National Bank*, 51 Michigan, 353, distinguished, and see *Hildreth* v. *Ellice*, 1 Caines, 192.

The referee abused the discretion lodged in him by the statute in entering the order preserving the alleged liens of the judgment and in subrogating the trustee in bankruptcy to all rights thereunder, even though it be conceded that the entry of the judgment and delivery of the executions to the sheriff did create liens. Section 67-f, Bankruptcy Act of 1898; *First National Bank* v. *Staake*, 202 U. S. 141; *Thompson* v. *Fairbanks*, 196 U. S. 516; *In re Moore*, 107 Fed. Rep. 234; 5 Cyc. 367 (note); *In re Sentenne Co.*, 9 A. B. R. 648; 1 Remington on Bankruptcy, 1489; Jones on Chattel Mortgages, 5th ed., par. 138.

Appellant's claim should have been allowed as a secured claim and appellant's mortgage should have been held to be a first lien on the assets of the bankrupt. Appellant's lien should not have been postponed to the alleged liens of the judgments.

A mortgage good as between the mortgagor and the mortgagee is good also against general creditors. *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146, 180; Hammon on Chattel Mortgages in Illinois, p. 50; *Allcock* v. *Foy*, 100 Ill. App. 573; *In re Antigo Screen Co.*, 123 Fed. Rep. 249; *Stewart* v. *Platt*, 101 U. S. 731.

A mortgage in Illinois on after-acquired property creates an equitable lien good as against the mortgagor and all his creditors who have not obtained liens by equitable proceedings. *Borden* v. *Croak*, 131 Illinois, 68, 75; *Morganstein* v. *Commercial Bank*, 125 Ill. App. 397; Illinois Stat. Anno., 1913, par. 7580, p. 4298; *Keller* v. *Robinson*, 153 Illinois, 458.

The debt in the case at bar became due fifteen years after the date of the bonds and mortgage. Notwithstanding this fact, the lien of the mortgage could be made

valid for four years, and appellant contends that it may be kept valid by successive renewals in accordance with the statute, until the maturity of the debt. *Fuller* v. *Smith*, 71 Ill. App. 576.

The provision of the statute with reference to the renewal or extension of a lien, after it once has attached to the personal property is to be liberally construed. *Cox* v. *Stern*, 170 Illinois, 452; *Hamilton* v. *Seegar*, 75 Ill. App. 599; *Fuller* v. *Smith*, 71 Ill. App. 576. And see *Swift* v. *Hart*, 12 Barb. 530; *Newell* v. *Warner*, 44 Barb. 258; *Nixon* v. *Stanley*, 33 Hun, 247; *Baker* v. *Becker*, 67 Kansas, 831; *Riederer* v. *Pfaff*, 61 Fed. Rep. 872.

In re New York Economical Printing Co., 6 A. B. R. 615; *Marsden* v. *Cornell*, 62 N. Y. 215, distinguished.

The burden of establishing the judgment lien was upon appellee and such liens could be established in one way only, and that by showing a compliance with the statute. Such compliance appellee has not shown.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Bonds amounting to twenty thousand dollars were issued to Fallows, Trustee, by The Tengwall Company, October 7, 1905, payable fifteen years thereafter. To secure them a trust deed or mortgage covering all its personal property was executed and duly recorded in Cook County, Illinois, November 1, 1905; an affidavit for the extension of this was filed October 5, 1908; and a second one October 6, 1909. On June 3, 1910, it gave promissory notes to sundry creditors aggregating more than twenty-five thousand dollars; the same day the holders took judgments thereon by confession in the Superior Court of Cook County; executions were taken out at once and delivered to the sheriff for service, but no levy was ever made.

June 4, 1910, a petition in involuntary bankruptcy was filed against the Company; a Receiver immediately appointed took possession of its property; and an adjudication of bankruptcy followed, June 17th. The Continental & Commercial Trust & Savings Bank was duly selected as trustee August 9th, and shortly thereafter presented a petition asking that the lien created by the executions upon the judgments of June 3rd be preserved, and that it be subrogated thereto for the benefit of the estate. (Bankruptcy Act, § 67-e.) The referee held appellant's answer resisting this petition insufficient, and allowed the subrogation as prayed.

The appellant sought to have all the bonds issued to him allowed as a preferred debt, claiming that they were secured by the above-mentioned trust deed, the lien of which was good as against all the world. The trustee in bankruptcy objected upon the ground that the deed could not prevail over the execution creditors because the Illinois statute limited its effect to three years subject only to a single extension of twelve months, and even if another were possible the second affidavit for extension filed October 6, 1909, was one day too late, and therefore unavailing. The referee sustained the objection and entered an order refusing to allow a preference in favor of the bonds. The District Court approved this action, and its decree was affirmed by the Circuit Court of Appeals (201 Fed. Rep. 82). Thereupon an appeal was taken to this court.

Three assignments of error are relied upon: (1) The order of the referee undertaking to subrogate the trustee to the judgment creditors' liens was erroneous and ought not to have been approved. (2) The trust deed of October 7, 1905, constituted a valid first lien upon all the property specified therein when the bankruptcy proceedings were begun. (3) The executions issued upon judgments of June 3, 1910, created no liens upon the bankrupt's property.

Section 67-f of the Bankruptcy Act, approved July 1, 1898, c. 541, 30 Stat. 544, 565, is copied in the margin.[1] Its purposes have been pointed out in *First National Bank of Baltimore* v. *Staake*, 202 U. S. 141, and *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354.

The propriety of subrogating the trustee to whatever liens were acquired under the judgments has been sustained by the three tribunals below. There is no proof showing an abuse of the discretion necessarily vested in them, and we accept their action in that regard as correct.

The validity and priority of the liens in question depend on the laws of the State, and § 9, chapter 77, and §§ 1 and 4, chapter 95, of Hurd's Revised Statutes of Illinois (1913) are pertinent. They are copied in the margin.[2]

[1] "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

[2] "§ 9. No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer to be executed; and for the better manifestation of the time, the sheriff or other officer shall, on receipt of such writ, indorse upon the back thereof the day of the month and year and hour when he received the same.

"§ 1. That no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property,

The provisions relative to the continuation of a mortgage after three years have not been definitely and authoritatively construed by the courts of Illinois. The Circuit Court of Appeals concluded that under them a mortgage lien expires as to judgment creditors three years after recordation, subject to one extension of twelve months from the filing of an affidavit in strict conformity with

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shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage.

"§ 4. Such mortgage, trust deed or other conveyance of personal property acknowledged as provided in this act shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded, or in case the mortgagor is not a resident of this State, then in the county where the property is situated and kept, and shall thereupon, if *bona fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or obligation, or extension thereof made as hereinafter specified: *Provided*, such time shall not exceed three years from the filing of the mortgage unless within thirty days next preceding the expiration of such three years, or if the debt or obligation matures within such three years, then within thirty days next preceding the maturity of said debt or obligation the mortgagor and mortgagee, his or their agent or attorney, shall file for record in the office of the recorder of deeds of the county where the original mortgage is recorded, also with the justice of the peace, or his successor, upon whose docket the same was entered, an affidavit setting forth particularly the interest which the mortgagee has by virtue of such mortgage in the property therein mentioned, and if such mortgage is for the payment of money, the amount remaining unpaid thereon, and the time when the same will become due by extension or otherwise; which affidavit shall be recorded by such recorder and be entered upon the docket of said justice of the peace, and thereupon the mortgage lien originally acquired shall be continued and extended for and during the term of one year from the filing of such affidavit, or until the maturity of the indebtedness or extension thereof secured by said mortgage: *Provided*, such time shall not exceed one year from the date of filing such affidavit."

the prescribed requirements. This conclusion harmonizes with the purpose and history of the statute, and we think is correct. The lien claimed by appellant, as against judgment creditors, therefore, did not continue after the fifth day of October, 1909, and the attempt further to extend it was ineffective. *Cook* v. *Thayer*, 11 Illinois, 617; *Porter* v. *Dement*, 35 Illinois, 478, 480; *Silvis* v. *Aultman*, 141 Illinois, 632; *Re New York Economical Printing Co.*, 110 Fed. Rep. 514; Jones on Chattel Mortgages (5th ed.), p. 287.

There is no adequate proof that the judgments against the bankrupt were fraudulently obtained. The referee found the executions were delivered to the sheriff for *service;* and appellant maintains this conclusively shows they were not "delivered to the sheriff or other proper officer *to be executed*," as required by the statute,—that "service" does not include "levy." The record discloses no instruction to the officer to refrain from carrying out the mandate of the writs, nor are there facts which clearly indicate a conditional delivery.

The Circuit Court of Appeals decided that under the circumstances of the present case the word service must be taken to include levy, saying (201 Fed. Rep. 82, 85): "In *Peck* v. *City National Bank*, 51 Michigan, 353, it is said: 'Service of an execution includes every act and proceeding necessary to be taken by the sheriff to make the money and includes the sale of the property when necessary.' The word has been defined to mean 'execution of process.' 35 Cyc. 1432. This construction seems to us reasonable in the case before us. It would be placing a strained meaning upon the transaction to hold that, when a party places an execution in the hands of a process officer, the latter is not charged with the duty, without further instructions, to proceed to make the money called for by the writ, which itself commands him to do so. In the absence of directions not to levy, it is the duty

of the officer to obey the directions and commands of the writ."

We are of opinion that the courts below properly interpreted the finding of the referee, and that the execution creditors secured valid prior liens upon the bankrupt's property. The decree is

Affirmed.